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Vol 3117

No. 15,092

IN THE

United States Court of Appeals

For the Ninth Circuit

CARYL CHESSMAN,
Appellant,

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On December 30, 1954, Chessman filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (CT 1.) Judge Goodman denied the writ on January 4, 1955. (CT 24.) Thereafter a certificate of probable cause was granted and the matter was appealed to this honorable court. This court rendered an opinion which is reported in *Chessman v. Teets,* 221 U.S. 276. Thereafter, a writ of certiorari

was sought and the United States Supreme Court ordered a hearing on the question of fraud and collusion in the settlement of the record. See 350 U.S. 3. (CT 53.)

On November 30, 1955, petitioner's counsel secured the issuance of a writ of habeas corpus returnable December 8, 1955. (CT 55.) A return to the writ was filed on December 8, 1955. (CT 56.) The matter was set for hearing on January 9, 1956. (CT 58.) At the same time the custody of petitioner was transferred to the marshal. Petitioner remained in the state prison and an order was made providing for consultation between petitioner and his counsel. (CT 59.) This order was thereafter amended on December 21, 1955. (CT 100.) Thereafter the trial of the matter was continued on January 10, 1956 and thereafter to January 16, 1956. (CT 122.) The matter proceeded to trial on January 16, 1956, and the trial continued through January 24, 1956. On January 31, 1956 Judge Goodman filed an opinion, findings of fact and judgment ordering the writ discharged and petitioner remanded to the custody of appellee. (CT 204-215.) Notice of appeal was filed on February 7, 1956. (CT 245.) Judge Goodman denied a certificate of probable cause on February 14, 1956. Chief Judge Denman of this court granted a certificate of probable cause on February 27, 1956. Another notice of appeal was filed on February 29, 1956.

Pages one through six of the clerk's transcript contains excerpts from the docket entries in the *Chessman* case from the period of December 30, 1954 to March 12, 1956.

STATEMENT OF FACTS.

Since petitioner has not attacked the sufficiency of any of the findings of fact, no detailed summary of the evidence produced at the trial will be made.

In 1948 petitioner was convicted of seventeen felonies. Two of the judgments imposed the death penalty. These convictions were affirmed on appeal by the California Supreme Court (*People v. Chessman,* 38 Cal.2d 166, cert. den. 343 U.S. 934, rehearing den. 343 U.S. 937). The court reporter, Mr. Perry, died without having completed his transcript. A substitute court reporter, Mr. Fraser, was employed to complete the transcript.

The substance of the allegations of the petition, which was made the traverse, was that the substitute court reporter, Mr. Fraser, the prosecutor, Mr. J. Miller Leavy, and the trial judge, Judge Fricke, conspired and colluded in the preparation of a fraudulent transcript for the California Supreme Court. Petitioner also alleged that Fraser was incompetent, and an instrument of the prosecutor, and that the notes were undecipherable. Petitioner specifically alleged that on May 21, 1948, the transcription omitted an instruction of the judge which required the jury to bring in a death penalty and that the transcript also omitted a remark of the judge to the effect that the petitioner was the "worst criminal" that had ever been in his court.

The substitute court reporter, Mr. Fraser, the prosecutor, Mr. Leavy, and Judge Fricke, were all produced and examined by petitioner's counsel at the

hearing. Likewise, Mr. Luskin, assistant county clerk in charge of the criminal records, who was at the time of the trial Judge Fricke's clerk, testified. Also, Mr. DeNoia, deputy clerk of the California Supreme Court and Mr. Jones, clerk of the Superior Court of Marin County, testified pertaining to records in their respective courts. Petitioner himself likewise took the stand.

The People produced a Pittman shorthand expert and two of the jurors as their witnesses.

As a result of the testimony of these witnesses the court expressly found that the prosecutor did not engage in any fraud or unlawful conduct in preparing the transcript on appeal in petitioner's case; that the prosecutor did not knowingly or otherwise make any misrepresentations to the trial judge for the purpose of inducing the trial judge to certify, allow or approve the transcript; that the prosecutor made no misrepresentations of any kind to the trial judge as to the accuracy or correctness of the transcript, and further, that it was not true that the transcript prepared by Fraser had been materially or otherwise altered through the connivance of Fraser or Leavy, nor was there any corrupt arrangement between them to prepare a fraudulent transcript.

The court found that the shorthand reporter Perry, was fully competent and physically able at all times to record the proceedings in the Chessman case.

Likewise, the court found that it was not true that the substitute reporter, Fraser, was a discredited reporter for the State of Washington; that it was not

true that Fraser had been discharged at any time for incompetency, drunkenness or for any other cause; that it was not true that Fraser was inebriated or under the influence of alcohol or mentally incapable of such work at any of the times he engaged in transcribing the notes.

The trial court further found that Fraser was especially and exceptionally competent to transcribe Perry's notes and did so with fairness and competence.

The instructions given by the trial judge to the jury on May 21 were accurately and correctly reported in the transcript as prepared by Fraser. The trial judge did not state to the jury that "the defendant is one of the worst criminals I have ever had in my court". (CT 211-213.)

ARGUMENT.

I.

THE DISTRICT COURT HELD A HEARING AND MADE FINDINGS ON THE ALLEGATIONS OF FRAUD AND CORRUPTION IN THE PREPARATION OF THE TRANSCRIPT FOR THE CALIFORNIA SUPREME COURT.

The decision of the United States Supreme Court in *Chessman v. California,* 350 U.S. 3, ordered a hearing on the question of fraud and corruption in the preparation of the transcript for the California Supreme Court. The trial court has held hearings and made findings on these issues. Appellant does not object to the propriety of the findings that there was no fraud

or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence. It is hoped that the allegations of fraud, corruption and inaccuracy are laid at rest once and for all, even though appellant insists upon repeating these allegations in his present brief.

II.

THE CONSTITUTIONALITY OF THE PROCEDURE USED IN THE CALIFORNIA COURTS TO SETTLE THE RECORD, HAS BEEN ADJUDICATED BY THIS COURT AND IMPLIEDLY ADJUDICATED BY THE SUPREME COURT OF THE UNITED STATES IN THE IMMEDIATE PROCEEDINGS, AS WELL AS IN PRIOR DECISIONS. THE PROCEDURES USED IN CALIFORNIA WERE CONSTITUTIONAL AND APPELLANT HAS WAIVED ANY OBJECTION HE MAY HAVE HAD CONCERNING THE LACK OF COUNSEL AT THE PROCEEDINGS TO SETTLE THE RECORD.

The constitutionality of the procedure used in the California courts has been adjudicated as constitutional; the procedures used were proper and in no way violated equal protection of the law. Appellant again contends that he was denied due process and equal protection of the law by the procedure used to settle the record in the State court. He alleges that in the absence of his physical presence the proceedings were fatally defective. There are at least three answers to these contentions.

A. The constitutionality of the procedures used to settle the record has been adjudicated.

This court, in the case of *Chessman v. Teets,* 221 Fed.2d 276 at 278, expressly determined that Chessman had waived his right to counsel and was precluded from urging the matter. The United States Supreme Court in 350 U.S. 3 impliedly adjudicated this issue by ordering a hearing solely on the question of fraud and collusion in the settlement of the record. Of course, the United States Supreme Court likewise impliedly approved the procedure used in prior decisions. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, the Supreme Court denied certiorari. (340 U.S. 840.)

In that particular case the United States Supreme Court had the opportunity to pass on all phases of the procedure used in the State court to settle the record.

Policy demands an end to litigation, and we will not assume that the United States Supreme Court intended that after a full hearing to determine the issue of fraud and corruption in the settlement of the record, the issue of the procedure used in the State courts should again be raised in the Supreme Court and thus further impede and stifle the State administration of justice.

B. The procedure used by the State court did not deny appellant due process or equal protection of the law.

A state is not required under the due process clause to provide an appellate procedure for review of a criminal trial. (See *Brown v. Allen,* 344 U.S. 443, at 486; *McKane v. Durston,* 153 U.S. 684, at 687.)

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas,* 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook,* 340 U.S. 206 (prison officials prevented the filing of an appeal); *Cole v. Arkansas,* 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman,* 35 Cal.2d 455. This *was and is the law of California.* This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State courts. See note 19 A.L.R.2d 1098. Also see *Dowdell v. United States,* 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law proceedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Augment and Correct Record" in which he requested numerous changes. The trial judge heard the written ob-

jections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination . . . and the same is now, therefore, approved by me . . ." (See *People v. Chessman,* 35 Cal.2d 455, at 459.)

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that the District Judge expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the Deputy District Attorney and no misrepresentation to the trial judge for the purpose of inducing the trial judge to settle the record. The District Judge likewise found that there was no fraud or collusion between the Deputy District Attorney, the substitute reporter, and the judge in the settlement of the record. Furthermore, the District Court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the District Court expressly found that Fraser and Leavy and the trial judge "endeavored to and did complete the transcript in the Chessman case in the best of good faith and with diligence and fairness so that a fair and correct record could be presented to the Supreme Court of California . . ." (CT 211-213.)

Furthermore, as is pointed out by the Supreme Court of California in the decision of *People v. Chessman,* 35 Cal.2d 455 at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the subject on appeal would nevertheless not have been affected. The California Supreme Court in this regard, said as follows:

> "Examination of the record in the light of defendant's claims discloses that it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been any miscarriage of justice. The record is not, as defendant asserts, 'unintelligible' in material part. It clearly shows (and there is no claim that it is insufficient or incorrect in this regard) the substance and the nature of the People's case and the substance and the nature of the defense of Chessman: Victims of the crimes testified for the People that certain criminal acts were committed and identified defendant as the person who committed them (except in one instance, a count of grand theft, where defendant was connected with the crime by evidence that the property was found in his possession); defendant denied that he committed the crimes and witnesses for him testified to alibis for some of them. The record appears to contain ample evidence to support the verdicts and there is no suggestion that this evidence was not actually received at the trial. Appraisal of the sufficiency of the evidence, insofar as any contention of the defendant is concerned, present no problems of gradations of possible states of mind of defendant, but only the questions whether certain behavior (which the People's witnesses testified and the jury believed was behavior of defendant)

constituted kidnapping for the purpose of robbery with bodily harm, first degree robbery, attempts at robbery and rape, violation of section 288a of the Penal Code, and grand theft.

"The asserted 'inaccuracies and omissions in the record' of which defendant complains are as follows: (a) The greater part of defendant's complaints consists of general claims that large portions of the transcript of testimony of witnesses are incomplete or inaccurate. Defendant does not claim that any different and more accurate transcription of the notes would show that the trial Court erroneously admitted or excluded any evidence. Certainly no factual basis is shown, and none is even claimed, for concluding that any erroneously admitted or excluded evidence prejudicially affected the verdicts. Claimed inaccuracies concern conflicting testimony and the credibility of witnesses. Making available to this Court the precise words of every witness would not enable it to upset the jury's determination that the People's witnesses, rather than defendant and his witnesses spoke the truth. As in People v. Botkin (1908), supra, p. 249 of 9 Cal.App., 'Under the condition of the evidence in this case (or any factual variation of the record suggested by defendant) . . . any views that we might have as to the credit that should be given to the evidence . . . could not justify us in reversing the judgment founded on the verdict of the jury that heard and saw all the witnesses as they gave their testimony'. . . . (c) Defendant has specified some particular changes in the record which, he says, the trial judge should have allowed. The unimportance of these matters is apparent for, had the proposed changes been allowed, the effect of the

record and the result of an appeal would have been in no way affected. (d) Defendant asserts that sarcastic statements of the prosecuting attorney during the trial have been omitted or 'smoothed over'. There is no claim that defendant objected to these statements or requested the Court to admonish the prosecuting attorney and instruct the jury to disregard improper remarks, nor is there any claim that the remarks were so serious that their effect could not have been removed by admonishment. In only one instance was a change made in Mr. Fraser's transcription of statements of the prosecuting attorney. This change was *in the portion of the notes dictated by Mr. Perry* but not typed by his transcriber until after his death. It was requested by the prosecuting attorney. In allowing it the trial judge said, 'this is one of the matters that I do particularly recall because of the unusual character of the situation.' Even had the correction not been allowed, defendant could not on appeal maintain that the statement amounted to prejudicial misconduct, for it was clearly invited by defendant. (e) Finally, defendant claims that in the transcription of the prosecuting attorney's closing argument 'Objectionable, prejudicial matter has been weeded out . . . Abusive references to the defendant have vanished.' Defendant specifies only two instances of such asserted inaccuracies. He says, 'Statements that "five to life means nothing to Chessman — life means nothing to Chessman" are abandoned in the transcription.' Defendant appears to be mistaken; a number of such statements appear in the transcript. And, defendant says, the transcript omits or modifies 'gross misstatements as to the law, incurable by

instruction, to the effect that life without possibility of parole doesn't mean that at all, and that the jury should and must return the death penalty because otherwise there was imminent danger the defendant again would be loosed by a lax administration of the law to prey upon society because the defendant was a cunning individual who knew the angles.' Defendant appears to be mistaken in this claim also. The transcript contains a great deal of argument in accord with the quoted statements, and the language of the transcript is no more temperate than that quoted." (Pages 462-465.)

C. Any alleged denial of due process by virtue of the fact that appellant was not present at the settlement of the record in the State court has been waived.

Appellant asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the State court. Petitioner's contention in the State court concerning representation of counsel at the settlement proceedings was not that he was not permitted to have counsel of his own choosing, or appointed counsel to represent him in these hearings, but simply that he should have been allowed to appear personally in the proceedings. To the extent that his present contention is different he has waived the contention. Appellant did participate to the extent that he prepared a long list of objections to the proposed record.

As this court in its decision of *Chessman v. Teets,* 221 Fed.2d 276 at 278 stated:

". . . Chessman also contends that he was denied effective representation of counsel. He initially

had counsel whom he relieved on March 12, 1948, the day he entered his pleas of not guilty. Thereafter he litigated until the instant proceedings in propria persona, repeatedly refusing proffered counsel at his criminal trial and in subsequent proceedings. On one of the occasions when he refused proffered counsel he stated to the court: 'I think I am a good enough lawyer.' The court then asked him, 'You don't want to trust it to a lawyer? Chessman responded: 'I don't want to do it.' Chessman finally agreed to allow an attorney to act merely as a legal adviser. Nowhere in his application does he allege that he demanded counsel after his persistent refusals of such aid. Chessman waived his right to counsel and is now precluded from urging denial of his constitutional right upon this ground."

As pointed out above, appellant's contention has never been that he was deprived of counsel at proceedings to settle the record, but his contention was that he was his own counsel and he must be allowed to be present. If his contention now is that he was deprived of the right to be represented by counsel at these hearings he has waived the objection by failing to raise the objection on appeal in the State court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

"Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear per-

sonally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts to present legal arguments. Neither reason, public policy, nor any express provision of law require defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendant who is represented by counsel. The judges of the Superior Court before whom he appeared carefully and repeatedly explained to him that his rights and privileges as a prisoner could not be enlarged by his decision to represent himself. In the trial Court he was repeatedly offered and refused counsel, and he has refused to accept appointment of counsel to represent him before this Court because counsel who volunteered to represent him could not agree to his 'condition he can continue in pro. per. with any legal action or stipulation . . . requiring co-signature of Chessman and (counsel).' In these circumstances he cannot complain that he has been prejudiced by the fact that he has not, since his conviction, been allowed to appear personally in court." (Volume 467.)

This is a reasonable rule of procedure and thus not violative of due process. In fact a like rule applies to federal prisoners who file appeals or other legal pro-

ceedings in federal courts after conviction and confinement.

III.

THE TRIAL COURT GAVE THE APPELLANT A FULL AND FAIR HEARING; THE COURT PROPERLY RULED ON THE EVIDENCE AND MOTIONS SOUGHT BY PETITIONER.

Appellant has enumerated many objections to the proceedings in the District Court. Some are completely unjustified and based upon a distortion of the proceedings below. Nevertheless, each such contention shall be discussed in this brief.

A. The District Court properly exercised its discretion in refusing to permit the petitioner to take depositions when the request was first made four days after the commencement of the trial.

Appellant complains that the District Court grossly abused its discretion in not permitting petitioner to take depositions and in the issuance of subpoenas for the production of certain witnesses.

It should appear clear that the District court had no power to issue subpoenas for the production of witnesses in Los Angeles.

Appellant filed a motion for an order for issuance of subpoenas and process for the taking of depositions on January 19, 1956. (CT 160-166.) This was four days after the actual trial of the matter had commenced, and well over a month after the return to the writ had been filed and the matter set for trial. Under these circumstances the District judge properly refused the issuance of the requested process.

Furthermore, under section 2246, 28 U.S.C., petitioner could have secured affidavits prior to trial and offered such affidavits in evidence. Petitioner did not do so.

B. The District Court's rulings on the evidence were proper and in this regard appellant has raised several false issues.

(1) Appellant's contention concerning the refusal of the District court to permit the accuracy of the transcript to be challenged at the trial is completely unsupported by the record.

Appellant complains that the District court refused to permit the accuracy of the transcript as prepared by the substitute court reporter to be tested and refused to permit the question of the decipherability of the notes to be resolved.

Appellant, in support of his contention, points to certain statements by the District court. Said complaint by appellant, however, is misleading. Appellant has not made one reference to the exclusion of evidence which he offered on the subject of the accuracy and decipherability of the notes. He does not point to any rulings, because there was no evidence offered on this subject by appellant. Also, he does not object to the ruling on any particular question put to the witnesses, Fraser and Burdick, who testified as to the accuracy and decipherability of the notes.

Indeed, in the preliminary stages in December, prior to the trial, petitioner's counsel asserted that their expert had found "hundreds" of errors in the transcript (pretrial RT 201-202. However, this witness

was not offered on the subject and no ruling as to the admissibility of his testimony was necessary. Perhaps the witness was not offered because if he were able to find "hundreds" of errors, it would indicate that he was able to decipher, and in fact could accurately read, the notes in order to determine the correct transcription from the alleged erroneous one.

Indeed, the record establishes that the District court offered to put the substitute court reporter in his chambers in order to permit him to work on the transcription of a page of the original notes (see RT 281-292:21.) Petitioner did not avail himself of this offer. Furthermore, the witness read the substance of p. 70-73 of the notes in court. (RT368.)

(2) The trial judge did not preclude the appellant from ascertaining whether the Deputy District Attorney had knowingly misrepresented to the appellant that he would be produced in court at the time of the settling of the record.

The trial court was correct in ruling that any misstatement made as to the place of the delivery of the transcript was immaterial. As long as appellant received a copy of the proposed transcript in time to prepare objections, it would appear any representation concerning the place of delivery would appear to be immaterial. In fact, the deputy district attorney did answer the question in dispute later in the proceeding. (RT 541-544; 543:6; 544:3.)

(3) Contrary to the contention of appellant, the trial court did not exclude hospital records and arrest

reports referring to the substitute court reporter, though the District Court would have been correct in so ruling had such evidence been offered.

Appellant raises a false issue in his contention that the District Court precluded him from offering arrest reports and hospital records concerning the substitute court reporter. Such issue was false because no such evidence was offered and no such ruling was necessary. Appellant sought an order for the production of such records but did not offer them. (RT 912.)

The District Court, however, would be correct in ruling that the hospital records and arrest reports are irrelevant to any issue of fraud and corruption in the case.

Likewise, the contention concerning the refusal of the trial court to permit questions concerning the hospital records and arrest reports is without substance. It would, perhaps, be proper to show that the substitute court reporter was intoxicated while actually working on the transcript, or that he was intoxicated while a witness in this proceeding. Compare *People v. Lionberger,* 19 Cal.App.2d 284; *People v. Figueroa,* 160 Cal. 80.

The hospital records referred to were clearly irrelevant since they were records of hospitalization of the substitute court reporter in 1953, three years subsequent to the date of the transcription. Likewise, the arrest reports were irrelevant since they did not establish that the substitute reporter was intoxicated while actually working on the transcript. It is submitted that even if it were established that he was intoxicated

while working on the transcript, it would not necessarily have a bearing on the issue of fraud and collusion.

C. The court was most liberal in granting time to the petitioner in which to prepare for trial.

In December, 1954, petitioner filed a *verified* petition swearing that the substitute court reporter, deputy district attorney and the trial judge entered into a fraudulent and corrupt arrangement to procure a fraudulent transcript for the use of the California Supreme Court. Presumably petitioner stood ready and able to prove those very serious charges at that time. The petition contains a statement that "said persons have stated that they are willing to testify to facts germane to this matter under oath pursuant to subpoena". (CT 22.)

On November 30, 1955, after a hearing on the question of fraud was ordered by the U.S. Supreme Court, appellant's counsel demanded the issuance of a writ of habeas corpus. (Pretrial RT 32.) At this same time petitioner's counsel insisted that petitioner was ready and able to proceed to trial immediately. (Pretrial RT 20:8; 32:24.) At petitioner's request the writ was issued returnable December 8, 1955. The trial was set for January 9, and later continued to January 16, 1956.

Thus the trial was held well over a month after the return to the writ was filed, when, in fact, the statute contemplates an immediate trial. Sec. 2243, title 28 of the U.S. Code provides that "When the writ or order

is returned, a day shall be set for hearing, not more than five days after the return, unless for good cause additional time is allowed." The statute contemplates an immediate trial on the sworn statements of the petition, which would become the traverse to the return. In the light of petitioner's initial insistence that he was ready for trial, the setting of the hearing at a period of a month and a half from the date was more than a liberal allowance by the trial court.

Petitioner also contends that his time to prepare was inadequate due to the facilities at the prison and the interference with his preparation by the prison authorities. He alleges that the affidavits filed by himself and other persons in the pretrial proceedings concerning the conditions at the prison were unanswered by counter-affidavits. Most of these proceedings were had without notice and due to the shortness of time counter-affidavits were unable to be prepared. (See pre-trial RT 120:10.)

It should be noted, however, that on December 21, 1955, Mr. Davis and Miss Asher had elected to use but 12 hours and 25 minutes out of a possible 104 hours available to them under the order of the court. (Pre-trial RT 119:13.)

Furthermore, insofar as the prison guards looked at the papers passed between Chessman and his counsel, the Warden testified that the guards did not know the difference between legal papers of one kind or another. They simply looked in order to determine whether the paper was part of a manuscript of a book or a legal document. (See pre-trial RT 154:13-17.)

Furthermore, on December 30, 1955, the District Court made the unprecedented offer to counsel that the petitioner might be transferred to the Federal authorities at Alcatraz, and set out in detail the availability of facilities to petitioner for consultation with his counsel and other persons. (See pre-trial RT 186:20-189.) This offer was not accepted.

D. The court was without authority to order the photostating of the shorthand notes; the original notes were available for the exclusive use of petitioner's agents in the clerk's office for one month prior to the trial.

Appellant contends that the District Court prejudicially abused its discretion in refusing to grant a motion to have the deceased reporter's shorthand notes photostated and furnished to appellant without cost. He bases his contention on 28 U.S.C. § 2250. This section provides as follows: "If on any application for a writ of habeas corpus order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending".

This statute was designed to apply to copies of indictments, minute orders, and other documents and records of the trial court where the trial court was a federal court.

It is doubtful whether this section was intended to apply to exhibits filed in evidence in a habeas corpus action. It certainly does not apply in the present case

where the shorthand notes at the time of the motion had been placed in the custody of the court prior to trial for the convenience of petitioner. Such notes were not filed either as records or as exhibits.

Certainly there was no prejudice in any event, since the notes were impounded on December 16, and the motion for photostating copies was first made on January 9, 1956, one week before the trial was to commence.

When the question of placing the notes in the custody of the clerk first arose it was agreed that they would be in the custody of the clerk for ten days and then would be returned to southern California. (Pretrial RT 64.) Petitioner's counsel was fully in agreement with that arrangement and in fact suggested it. (RT 64:5.) When the notes were placed in the custody of the clerk of the court, respondent stipulated that they might be available in northern California for the whole period, even though such a procedure was distinctly disadvantageous to respondent since it required his witness to use photostats in place of the originals.

IV.

THE DISTRICT COURT PROPERLY PERMITTED THE PROSECUTOR TO APPEAR AS CO-COUNSEL FOR RESPONDENT. IT IS DOUBTFUL WHETHER THE DISTRICT COURT COULD HAVE PREVENTED HIM FROM SO APPEARING.

After having the allegations of fraud and collusion against the prosecutor soundly repudiated by the District Court, petitioner now makes another attack on the

prosecutor for appearing as co-counsel. The contention is framed in terms of an abuse of discretion by the District Court in permitting the prosecutor to appear as co-counsel.

There is no dispute that the prosecutor, Deputy District Attorney J. Miller Leavy, was admitted to the Bar of California and fully qualified to be admitted to practice in the District Court. It is doubtful whether the District Court could have prevented the statutorily designated counsel for the warden from appearing in court. Such appearance in this case presents no ethical problem for two reasons. First the prosecutor did not comment on his own evidence, or, for that matter, did he comment on any evidence. Secondly, although he did render invaluable assistance to the Attorney General, this was not necessarily a matter of choice with the prosecutor.

Section 12550 of the California Government Code provides as follows: "The Attorney General has direct supervision over district attorneys of the several counties of the State. . . ." Thus, since the Deputy District Attorney was requested to assist the Attorney General, it appears that under the State law neither the District Attorney nor the Deputy could refuse such assistance. Appellant's attack on the Deputy District Attorney and the District Court ruling is unfounded in fact and in law.

V.

THE STATE OF CALIFORNIA WAS NOT A PARTY TO THE HABEAS CORPUS PROCEEDING; THE DISTRICT COURT DID PERMIT THE PETITIONER TO CALL SEVERAL WITNESSES, INCLUDING THE SUBSTITUTE COURT REPORTER, THE PROSECUTOR AND THE JUDGE AS ADVERSE WITNESSES.

The State is not a proper party to a habeas corpus proceeding in a Federal District Court and to so join the State as a party would be a violation of the Eleventh Amendment of the United States Constitution.

The theory sustaining habeas corpus proceedings in Federal courts where a state prisoner is involved has always been that if the petitioner is being detained in violation of his constitutional rights, the state officer so detaining the petitioner is acting beyond his authority as a state officer.

The State of Pennsylvania expressly attacked habeas corpus proceedings as unconstitutional in violation of the 11th Amendment in the case of *Ex rel. Elliott v. Hendricks,* 213 Fed.2d 922, on the ground that the proceeding was a suit against the state in violation of the 11th Amendment. The court, however, stated:

> "But we think to argue that the habeas corpus proceeding is a suit against Pennsylvania is not an accurate way to describe its nature . . . the writ proceeds against the custodian . . ."

Likewise see the statement in *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 at 689, 690 and *Ex parte Young,* 209 U.S. 123, 167-168, both relying on the theory that the act of the officer against

whom the relief is sought is beyond the officer's power and thus not the conduct of the state.

Petitioner claims that he was deprived of the right to call the prosecutor, the court reporter, the trial judge and others as adverse witnesses. The fact of the matter is that the court did permit the petitioner to call several witnesses as adverse witnesses. The court permitted the examination of several witnesses as if they were under cross-examination, e.g. the substitute court reporter. (RT 166-444.) The question of the right to impeach these witnesses was never raised in the proceedings since petitioner did not attempt to do so. Certainly the court permitted contradiction of these witnesses. The petitioner's testimony contradicted them in several respects.

This question raised by the appellant is for the large part purely hypothetical.

VI.

THE DISTRICT COURT RULED CORRECTLY IN STRIKING THE AFFIDAVIT OF PREJUDICE AS INSUFFICIENT AND UNTIMELY. THE RECORD ESTABLISHES THAT THE TRIAL COURT AFFORDED PETITIONER A FULL HEARING AND WAS VERY FAIR AND VERY PATIENT.

Appellant contends that the judge incorrectly struck the affidavit of prejudice on the ground that it was untimely and insufficient. He further alleges that the procedure used as to the affidavit of prejudice was incorrect and alleges that the judge was in fact biased.

It is proper for the judge before whom an affidavit of bias or prejudice is filed to determine whether or not such affidavit is legally sufficient, and if insufficient to refuse to disqualify himself. *U. S. v. Valenti,* 120 Fed. Supp. 80. Appellant's contention that the judge against whom the affidavit of bias or prejudice is filed must permit another judge to pass on the sufficiency of the affidavit is unsupported by any decisions.

The District Court correctly ruled that the affidavit was untimely. The statute, 28 U.S.C. 144, provides:

> "The affidavit . . . shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

The petition for writ of habeas corpus was originally filed in December 1954 in the United States District Court and assigned to Judge Goodman. A hearing was ordered in the matter by the United States Supreme Court in the Fall of 1955. It has been, and is, the practice of the District Court to assign such matters to the judge originally participating in the proceeding. On November 30, 1955, petitioner's counsel was expressly informed that Judge Goodman was assigned to the hearing in this matter. At that time there was innuendo on the part of counsel that the judge should disqualify himself. (Pretrial Rt. 7-12; 19:7-25.) Nevertheless, an affidavit of prejudice was not filed until approximately one month later, December 29, 1955. This was 30 days after petitioner was expressly informed that Judge Goodman would handle the matter and approximately ten days prior to the time then

set for trial. No extended discussion of the timeliness of said affidavit should be necessary.

Likewise, the district judge correctly ruled that the allegations of the affidavit were insufficient to show personal bias and prejudice. Such affidavit was based on no more than a mere opinion of the judge on a matter of law and an adverse prior ruling, which ruling was based upon a decision of this court. These allegations fall far short of a showing of personal bias or prejudice against one party or for the other party necessary to disqualify a judge. See *U. S. v. Valenti,* 120 Fed. Supp. 80; *Price v. Johnson,* 125 Fed.2d 806 (9 Cir., 1942); *Tupper v. Kerner,* 186 Fed.2d 79, 84 (7th Cir., 1950).

VII.

THE DISTRICT COURT PROPERLY DECLINED TO DECLARE APPELLANT'S RIGHTS UNDER HIS CONTRACT WITH COUNSEL AND HIS RIGHT TO MANUSCRIPTS.

28 U.S.C. §2201 grants the court power to declare the rights of parties in a case or controversy within its jurisdiction. Neither the Director of Corrections, whose regulation concerning prison manuscripts, nor the State of California were parties to the habeas corpus action. Thus the proper parties were not before the court. It would appear improper to declare the right of petitioner insofar as they directly affected parties not before the court.

Secondly, if there is any controversy over the right of the petitioner to obtain his manuscripts, the controversy involves a question of State law. Petitioner asserts that he has a property right. However, the extent to which he has a right, if any, is a question of State law. It also involves the validity of the regulations of the State prison. This question should be determined in State courts. A petition has since been filed in the Marin County Superior Court and the matter partially adjudicated.

Furthermore, there is no merit in petitioner's contention that he has a right to the manuscripts. (See *U.S. ex. rel. Wagner v. Ragen,* 213 Fed.2d 294 (7th Cir., 1954). The inmate objected to the warden's refusal to permit the petitioner to register his invention in the United States Patent office, or to assign his inventions. *Siegel v. Ragen,* 180 Fed.2d 785 (7th Cir., 1950). The case was concerned with allegation that the warden had deprived the prisoner of property without due process of law. Also see *Stroud v. Swope,* 187 Fed.2d 850 (9th Cir., 1951). In that case the court held that an inmate of the federal prison was not entitled to carry on business affairs representing efforts to secure publication of a book or books, which he claimed to have been preparing while in prison.

CONCLUSION.

We respectfully submit that the judgment of the District Court discharging the writ and remanding the custody of the appellant to the warden be affirmed.

Dated, San Francisco, California,
June 22, 1956.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.

NO. 15092

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARYL CHESSMAN, Petitioner and Appellant, vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	)

APPELLANT'S OPENING BRIEF

Appeal from an Order of the United States District Court, Northern District of California, Southern Division, by the Hon. Louis E. Goodman, District Judge, Discharging a Writ of Habeas Corpus and Remanding Petitioner to the Custody of Respondent.

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In Propria Persona

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MISCELLANEOUS

NOTE

In this brief:

The Transcript of Record from the District Court will be referred to as R. ---.

The Reporter's Transcript of the pre-trial proceedings (pre-trial record) will be referred to as PTR. ---.

The Reporter's Transcript of the hearings (hearing record) will be referred to as HR. ---.

The Reporter's and Clerk's Transcripts on appeal to the California Supreme Court will be referred to as Rep. Tr. --- and Cl. Tr. ---.

The original exhibits before the District Court will be referred to as Pet. Ex. --- and Resp. Ex. ---.

Unless otherwise indicated, emphasis has been added by appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARYL CHESSMAN, Petitioner and Appellant, vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	No. 15092

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court to hear and determine the petition for writ of habeas corpus was based upon the allegations of deprivation of constitutional rights by the California courts (28 USC §§ 2241, 2242 and 2243); the exhaustion of appellant's remedies in the State courts (28 USC § 2254); and the mandate of the Supreme Court ordering a hearing in the District Court (R. 53; Chessman v. Teets (1955), 350 U.S. 3).

After the mandate came down, the writ issued (R. 55), and hearings were held (HR. 1-923). On January 31, 1956, the District Court discharged the writ and remanded appellant to custody of the respondent (R. 213).

A certificate of probable cause to appeal was sought

and granted by Chief Judge William Denman of this Court on February 29, 1956 (R. 252-254; Chessman v. Teets, F.2d). On the same date, notice of appeal was filed (R. 255). Thus this Court has jurisdiction to review the judgment and order of the District Court discharging the writ and remanding appellant to custody of the respondent (28 USC § 2253).

This jurisdictional statement is offered in accordance with the requirements of Rule 18, Par. 2(b) of the Rules of this Court. The appeal is taken under the provisions of 28 USC §§ 1291, 1294(1) and 2253, and Rule 73, FRCP.

A motion, with supporting affidavit, for permission to prosecute the appeal in forma pauperis and on a typewritten record has been made to this Court under 28 USC § 1915, and the motion has been granted.

STATEMENT OF THE CASE AND THE FACTS

This appeal is taken from the judgment and order of the District Court (Judge Louis E. Goodman), made and entered on January 31, 1956, discharging a writ of habeas corpus previously granted and remanding the appellant Chessman to the custody of the respondent Warden of the California State Prison at San Quentin (R. 213; Chessman v. Teets, F. Supp.).

As noted, all necessary jurisdictional and procedural requirements for the prosecution of the appeal have been

satisfied (Jurisdictional Statement, supra).

The petition for the writ was originally filed in the District Court as No. 34375-Civil on December 30, 1954, after the Supreme Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (Chessman v. Teets (1954), No. 285, Oct. Term, 1954, 348 U.S. 864.)

By his application, appellant sought to have a hearing on the facts alleged in the petition, upon proper notice, with petitioner and his counsel present and allowed to be heard at such hearing, and to be given the opportunity and right to present evidence in support of the petition.

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring respondent to answer (R. 24; In re Chessman, 128 F.Supp. 600).

Two days later, Judge Goodman refused to issue a certificate of probable cause. Appellant then applied to Chief Judge William Denman of this Court for the certificate, and on January 11, 1955 Judge Denman certified there was probable cause to appeal and ordered that appellant's execution, then scheduled for January 14, 1955, be stayed (Application of Chessman, 219 F.2d 162). The notice of appeal, dated January 5, 1955, was filed and the appeal docketed as No. 14621 in this Court.

After the cause was briefed and argued, on April 7,

1955, the order denying the petition for habeas corpus was affirmed by this Court sitting en banc (Chessman v. Teets, 221 F.2d 276). Rehearing was denied on May 6, 1955, and on May 12 the order amending the order denying a rehearing was filed. Appellant's stay of execution was thereby terminated.

On May 13, 1955, appellant was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955, the case was docketed in the Supreme Court and a petition for writ of certiorari to this Court was filed, No. 196, Oct. Term, 1955. An application for a stay of execution was also filed.

Supreme Court Justice Tom Clark granted appellant's application for a stay of execution pending a decision on the petition for writ of certiorari on July 5, 1955. The stay order was received and filed by the Supreme Court Clerk on July 6, 1955.

On October 17, 1955, the Supreme Court granted certiorari, reversed this Court, and remanded the case to the District Court for a hearing (Chessman v. Teets, 350 U.S. 3). In its Per Curiam opinion, the Supreme Court discussed appellant's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been

heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F.Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F.2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

And in certifying probable cause, Chief Judge Denman correctly noted that (R. 252-253):

"The court reporter who recorded the trial died after transcribing only a portion of his notes. By a peculiar quirk of California law in a civil case such a death of a reporter gives the trial court the discretionary power to set aside the judgment and order a new trial, California Code of Civil Procedure § 953(e), but there is no comparable provision whatever for criminal cases. Here another reporter finished the transcription of the notes. Thereafter a proceeding to perfect the transcript was conducted by the Superior Court which had tried Chessman. This proceeding was participated in by the reporter who had finished the transcription and who had difficulty in certain places in the notes made under the shorthand system used by the dead reporter. In seeking to overcome this difficulty the testimony of certain witnesses was used, including that of the prosecuting attorney. The latter aided by giving his memory of what transpired at the trial.

"Chessman was at no time present in this proceeding to perfect the transcript nor represented by

counsel, to present his contentions, inter alia, that the transcript should show certain prejudicial statements made by the prosecuting attorney and the instructions to the jury that if they found him guilty they must render a verdict for the death penalty. He was denied the opportunity to cross-examine witnesses, present witnesses and add his own memory to the resources from which the transcript was finally compiled."

Appellant's application to be produced when the transcript was settled was denied without prejudice by the California Supreme Court, and simply ignored by the trial judge, the Hon. Charles W. Fricke, although the trial prosecutor earlier had sworn to the California Supreme Court that appellant would be present and allowed to present his objections.

Appellant, at the time of the settlement of the transcript was appearing in propria persona, without representation by counsel. He has been held in San Quentin Prison's Death Row, awaiting execution, since July 3, 1948. For five years and ten months from that date he continued to represent himself. At no time did the courts of California ever accord appellant an opportunity to defend against the transcript at a hearing to test the transcript's validity and adequacy. (See, e.g., People v. Chessman (1950), 35 Cal.2d 455 [218 P.2d 769, 19 ALR2d 1084].)

Appellant had been tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court on appeal as part of Petitioner's Exhibit 1,

records of the California Supreme Court in Crim. 5006, People v. Chessman.)

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Appellant defended himself. Eighty-one witnesses testified and were called or recalled a total of more than 120 times (see Rep. Tr., Vol. 1, General Index to Witnesses, pp. i-v). It will be noted the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript (Rep. Tr. pp. 55-1558). Eighty-four exhibits were offered (see Rep. Tr., Vol. 1, Index to Exhibits, pp. vi-x). There were two full days of argument to the jury (Rep. Tr. pp. 1559-1786). More than 50 different, complex instructions were given (Cl. Tr. pp. 83-134).

On May 21, 1948, appellant was found guilty of 17 of the charged felonies, acquitted on one (Cl. Tr. pp. 172-222). Motion for new trial was denied and judgment rendered on June 25, 1948, and appellant was then sentenced twice to death[1] and to 15 terms of imprisonment.[2]

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[1] For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[2] For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft of an automo-

(continued)

The lengthy litigation ensued which resulted ultimately in the Supreme Court-ordered hearing in the court below.

On November 10, 1955, George T. Davis and Rosalie S. Asher, new counsel for appellant, filed their notice of appearance on appellant's behalf with the District Court (R. 50).

The mandate came down and was filed in the District Court on November 28, 1955 (R. 53). Two days later, on November 30, 1955, Oliver J. Carter, the Judge then sitting in the Master Calendar Department, assigned the proceeding back to Judge Louis E. Goodman over the objection of counsel for appellant (PTR. 2-6).

Judge Goodman rejected counsel for appellant's suggestion he disqualify himself (PTR. 7-13, 19-20), ordered appellant's execution stayed (R. 54), and issued a writ of habeas corpus returnable on December 8, 1955 (R. 55).

Subsequently, on December 30, 1955, Judge Goodman ordered stricken (R. 120) an affidavit filed December 29, 1955, under 28 USC § 144, which sought to disqualify him from hearing the matter (R. 101).

Appellant was produced in court on December 8, 1955, and hearing of the matter was set for January 9, 1956,

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bile; for 8 counts of First Degree Robbery; and for one count of Attempted Robbery.

(R. 58; PTR. 42-56), then put over one day to January 10, 1956 (R. 85; PTR. 107), and later reset for January 16, 1956 (R. 122; PTR. 206).

On December 8, 1955, Judge Goodman made an order that respondent should permit appellant to consult freely and privately with his counsel at the prison between the hours of 9 a.m. and 6 p.m. on all days pending the hearing (R. 59). This order was amended on December 21, 1955 to permit an investigator and witnesses also to consult freely and privately with appellant (R. 100).

Pending the hearing, appellant repeatedly motioned to be transferred from San Quentin Prison to the San Francisco County Jail, in custody of the United States Marshal, on the ground he was being prevented from preparing his case for hearing and that Judge Goodman's amended order was being flagrantly violated by respondent (R. 6-79, 86-87, 89-98; see R. 109-117, PTR. of November 30 and December 8, 16, 21).

All of these motions for transfer were denied by Judge Goodman (R. 48, 59, 99), even after the California Attorney General's office, counsel for respondent, joined in one of the motions(PTR. 176).

Judge Goodman offered to transfer appellant to Alcatraz (PTR. 187-190). Appellant accepted but asked only that he be transferred with such directions to the warden as would enable him a reasonable opportunity to prepare for the hearing (R. 123, 125, 128). Appellant's counsel, by a

phone call to Warden Madigan, had learned that if appellant were to be transferred without such orders appellant would be confined in what amounted to solitary confinement (R. 134-138). Judge Goodman chided appellant and his counsel for not accepting unconditionally, and refused to make the transfer (R. 126; see R. 128, 130, 132).

Having exhausted his funds and credit, appellant was obliged to file an affidavit seeking to proceed in forma pauperis on January 7, 1956 (R. 139). On January 10, 1956, Judge Goodman granted appellant leave to proceed in forma pauperis (R. 157).

Hearings were held, with appellant present, on January 16, 17, 18, 19, 20, 23 and 24, 1956 (HR. 1-919).

Appellant's motion to make the People of the State of California a respondent in the proceedings (R. 127) was denied (R. 215, item 9(a); PTR. 220-224).

J. Miller Leavy, the deputy district attorney who had prosecuted appellant and whom appellant had charged with fraudulent conduct in the petition, and a key witness, was permitted to appear as one of the counsel for respondent over the objections of appellant's counsel (HR. 3-9).

Appellant's application to be furnished a photostatic copy of the dead reporter's shorthand notes without prepayment of costs (R. 145) was denied (R. 157).

Appellant's application for a declaration of rights under 28 USC §§ 2201 and 2202 (R. 168-169) was summarily

denied (HR. 915-916).

Appellant's attempts to secure court orders to take the depositions of material witnesses or to have them subpoenaed was unsuccessful (R. 157, HR. 913-914; see R. 160, 167).

Judge Goodman would not permit the ability of Stanley Fraser, the substitute reporter, to transcribe the dead reporter's notes to be tested (HR. 248-250).

Judge Goodman would not permit appellant to prove Stanley Fraser had, as alleged in the petition, a long arrest record for drunkenness and that he had been arrested for that same offense during the actual period he was attempting to prepare the reporter's transcript; and that Fraser's chronic addiction to alcoholic beverages led to his attempting suicide, suffering from delirium tremens and hallucinations that the Mafia was after him, and lengthy hospitalization (R. 912; see R. 150, 152-153, item 20, 162-163, item 5; PTR 234).

On January 25, 1956, Judge Goodman ordered the matter submitted, and, as noted above, on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ and remanded appellant to custody of the respondent (R. 204-215; Chessman v. Teets, F.Supp.).

Those further facts essential to a determination of the appeal will be presented under the various points of argument below.

Samuel [illegible]

Appeal [illegible]

the [illegible]

subpoena [illegible]

160, 161.

[illegible]

Fraser, [illegible]

reporter [illegible]

[illegible]

lay [illegible]

record [illegible]

that [illegible]

ing [illegible]

[illegible]

ing and [illegible]

[illegible]

[illegible]

Item [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

215; [illegible]

[illegible]

the [illegible]

argument [illegible]

SPECIFICATION OF ERRORS

The District Court erred:

1. In not ordering appellant discharged from custody on the ground that he was denied due process of law and equal protection of the law because he was not permitted to be present or represented by counsel at the time the disputed reporter's transcript was settled and because the courts of California gave him no opportunity to defend against that transcript.

2. In denying appellant that type of full and fair hearing ordered by the Supreme Court by:

a. Refusing to permit the taking of depositions of material witnesses or to order their production;

b. Depriving appellant of a just resolution of the issues by its rullings too narrowly and prejudicially restricting, or excluding altogether, competent, material and relevant evidential proof;

c. Refusing to allow appellant adequate time and opportunity to prepare for the hearings;

d. Permitting J. Miller Leavy to appear as one of the counsel for respondent;

e. Denying appellant's motion to make the People of the State of California a respondent in the proceedings;

f. Refusing to have the dead reporter's shorthand notes photostated and furnished appellant without prepayment of costs; and

g. Refusing to disqualify itself and allow another District Court Judge to pass on the affidavit to disqualify under 28 USC § 144.

3. In ruling that, on jurisdictional grounds, it could not and would not declare appellant's rights under 28 USC §§ 2201 and 2202.

SUMMARY OF ARGUMENT

I. A. Appellant was not permitted to establish inadequacies and omissions in the disputed reporter's transcript, was not permitted to be present or represented by counsel at the time of its settlement (or at any time), and was not permitted to produce witnesses or to test the ability of the substitute reporter to transcribe the dead reporter's shorthand notes.

B. The courts of California denied to appellant due process and equal protection of the law in ordering prepared, settling, and accepting for use on appeal such a reporter's transcript of the trial proceedings, used as a basis for affirming the death and other judgments, without giving appellant any opportunity to defend against that transcript.

II. Appellant was denied that type of hearing ordered and contemplated by the Supreme Court of the United States in its mandate (350 U.S. 3) because:

A. The District Court refused to permit the taking of depositions of material witnesses or to order their

production.

B. The District Court deprived appellant of a full and fair resolution of the issues by its rulings too narrowly and prejudicially restricting, or excluding altogether competent, material and relevant evidential proof.

C. The District Court refused to allow appellant adequate time and opportunity to prepare for the hearings before such deprivation amounted to a denial of due process of law.

III. The District Court prejudicially abused its discretion, over appellant's objection, in permitting J. Miller Leavy to appear as one of the counsel for respondent.

IV. The District Court erred, to appellant's prejudice, in denying appellant's motion to make the People of the State of California a respondent in these proceedings.

V. The District Court committed reversible error in ruling that, on jurisdictional grounds, it could not and would not declare appellant's rights under 28 USC §§ 2201 and 2202.

VI. The District Court prejudicially abused its discretion in refusing to have the dead reporter's shorthand notes photostated and furnished appellant without prepayment of costs.

VII. A. The record shows, as a matter of law, a personal and fixed bias on the part of Judge Goodman against appellant and in favor of the State of California.

B. Judge Goodman, on the filing of the affidavit to disqualify, should have permitted another District Court Judge to pass on the disqualification in the manner provided by 28 USC § 144.

ARGUMENT

I A. APPELLANT WAS NOT PERMITTED TO ESTABLISH INADEQUACIES AND OMISSION IN THE DISPUTED REPORTER'S TRANSCRIPT, WAS NOT PERMITTED TO BE PRESENT OR REPRESENTED BY COUNSEL AT THE TIME OF ITS SETTLEMENT (OR AT ANY TIME), AND WAS NOT PERMITTED TO PRODUCE WITNESSES OR TO TEST THE ABILITY OF THE SUBSTITUTE REPORTER TO TRANSCRIBE THE DEAD REPORTER'S NOTES.

The official court reporter died after the trial and before he had completed some 1200 pages of testimony, plus another 300 pages of the voir dire examination of prospective jurors and the prosecutor's opening address.

California law mandatorily requires an automatic appeal to its Supreme Court in capital cases. (Pen. Code, § 1239(b).) This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (People v. Bob (1946), 29 Cal.2d 321, 328 [175 P.2d 12].)

The Rules of the California Judicial Council declare that the entire record of the trial must be prepared and certified as true and correct by the court reporter who stenographically recorded the trial proceedings. (Rules

on Appeal, Rules 33(c) and 35(b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (Kuhn v. Ferry & Hensler (1948), 87 Cal.App.2d 812, 815.) "[T]he procedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interests of orderly functioning of the administration of justice." (People v. Gilbert (1944), 25 Cal.2d 422, 439 [154 P.2d 657].) And the State's organic law commands that the California Supreme Court must review the entire record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, § 4 1/2.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with the laws and rules governing appeals. As a doubtful makeshift procedure, at the direction of the trial judge (who directed preparation of the transcript, not by law and by rule, but by "human ingenuity"), the prosecutor selected another reporter, Stanley Fraser, to undertake to transcribe the dead reporter's old-style, three-position, shaded Pitman shorthand notes.

This reporter, paid over three times the statutory fee for his labors (R. 208-209), was the uncle-in-law of the prosecutor, J. Miller Leavy (HR. 170, 452), a fact kept concealed from the trial judge during the period of preparation (HR. 860-861). After many months and extensions

of time, Fraser finally produced what purported to be a reporter's transcript of the trial proceedings.

Without the knowledge of the trial judge or appellant (HR. 870-871), but with the knowledge and at the suggestion of Leavy (HR. 504, 533), Fraser had consulted with two key prosecution witnesses, Los Angeles Detectives Lee Jones and Colin Forbes, about their testimony (HR. 396-397, 417-420), thus enabling them to give testimony out of court and in the absence of appellant. This fact was not known to the State Supreme Court in any of the proceedings before it. Fraser also had used the trial judge's longhand notes (Resp. Ex. B) never made available to appellant, to aid him in preparing the so-called reporter's transcript, and, uniquely, prepared it first in "rough draft" form and permitted it to be checked by Leavy before being copied in "final form."

Hearings were held in the trial court to settle the transcript, with Leavy actively participating. During the course of these hearings, witnesses were called and testified. Appellant was neither present nor represented by counsel. His motion to be present, challenge the transcript produce witnesses of his own and test the ability of the substitute reporter was denied without prejudice by the California Supreme Court and ignored by the trial court.

When he testified at the hearing in the court below, Leavy lightly dismissed his erroneous sworn statement to the State Supreme Court that appellant would be produced

in the trial court when the record was settled as a mistake (HR. 543). It was a "mistake" he easily could have avoided, had he wanted to, by simply having asked the trial judge if the latter did in fact intend to produce appellant. It was further a "mistake" relied on by the California Supreme Court and one that bordered on, if it did not actually involve, perjury.[3]

Later, still over appellant's vigorous objections, with portions being ordered added to it but with hearings on its validity and accuracy never being held, this record was ultimately accepted by the California Supreme Court[4] (People v. Chessman (1950), 35 Cal.2d 455 [218 P.2d 769,

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[3]See Calif. Pen. Code, § 125: "An unqualified statement of that of which one does not know to be true is equivalent to a statement of that which one knows to be false."

[4]That court admitted the challenged transcript "was prepared in a situation for which the Rules on Appeal do not expressly provide" (p. 458 of 35 Cal.2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal.2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, appellant was entitled to the entire record (p. 459 of 35 Cal.2d), the court refused to order the record augmented to include what is indicated in the transcript as a "(Discussion as to subpoenaing witnesses)" (Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an Attorney, William Roy Ives, given the opportunity to prepare the case, would appear with or for the defendant, (p. 465 of 35 Cal.2d), both discussions taking place after the cause was called.

Finally, while recognizing that a determination of
(continued)

19 ALR2d 1084]), and later used as a basis for affirming the death and other judgments imposed (People v. Chessman (1951), 38 Cal.2d 166 [238 P.2d 1001]).

B. THE COURTS OF CALIFORNIA DENIED TO APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN ORDERING PREPARED, SETTLING, AND ACCEPTING FOR USE ON APPEAL SUCH A REPORTER'S TRANSCRIPT OF THE TRIAL PROCEEDINGS, USED AS A BASIS FOR AFFIRMING THE DEATH AND OTHER JUDGMENTS, WITHOUT GIVING APPELLANT ANY OPPORTUNITY TO DEFEND AGAINST THAT TRANSCRIPT.

As a result of the facts disclosed just above, appellant never was given an opportunity in the State courts,

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whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise" (p. 461 of 35 Cal.2d), and while placing the burden of proving the prejudicial inadequacy of the transcript upon appellant (p. 462 of 35 Cal.2d), and noticing that appellant "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position" (p. 467 of 35 Cal.2d), by denying his motions that he be allowed to appear in the superior court, adduce evidence and call hostile and unwilling witnesses, the court itself foreclosed appellant from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal.2d). See dissenting opinions (pp. 468-473).

An earlier attempt to stop the preparation of the transcript by this unique means failed when, in answer to a petition for writ of prohibition filed in the California Supreme Court, the prosecutor filed an affidavit in which he swore that appellant would be produced in the trial court and allowed to present his objections to the record at that time; that is, when the transcript was "settled." (Chessman v. Superior Court (Nov. 1948), Crim. 4950, unreported.) But appellant was not produced, and the prosecutor, although content to let the Supreme Court rely on his representations, did not tell the trial court of them.

at any time, to defend against this disputed transcript or to prove, as he claimed, that it was prejudicially incomplete and inaccurate, and in fact no transcript at all; that it prevented appellant from establishing that he had been convicted in violation of fundamental constitutitional guarantees protected by the 14th Amendment (by the instructions of the trial court; by the use in evidence of a coerced "confession" made orally only; by the flagrant misconduct of the prosecutor; by being deprived of any opportunity to prepare his defense or to be represented by counsel of his own choice, and by not being allowed to subpoena defense witnesses); and that the prosecutor and the substitute reporter, a person allegedly mentally and morally incompetent because of his chronic addiction to and excessive use of alcoholic beverages, had prepared a fraudulent transcript and corruptly secured its acceptance by the State courts.

The guides for decision and controlling law are clear.

Appellant was entitled to an appeal (In re Albori (1928), 95 Cal.App. 42, 48-49):

> " . . . in all the fullness with which we have seen that it is characterized, [because it is a right] guaranteed by the constitution to the appellant. It is he who is to be protected by the appellate tribunal."

In California (In re Hoge (1874), 48 Cal. 3, 6):

> "The right of appeal to the supreme court is guaranteed by the constitution to the prisoner, and is as sacred as the right of trial by jury."

And (Wuest v. Wuest (1942), 53 Cal.App.2d 339, 345):

> "The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby."

Whether appellant has been denied due process of law and equal protection of the law must be tested by all of the judicial proceedings in the California courts, including the mesne and appellate proceedings (Cole v. Arkansas (1948), 333 U.S. 196; Frank v. Mangum (1915), 237 U.S. 309).

When the California Supreme Court decided the question of the validity and adequacy of the uniquely prepared transcript against appellant, while denying him any opportunity to present his evidence against its validity and adequacy, although placing the burden of proof squarely upon him, it denied appellant due process in its most primary sense. (Saunders v. Shaw (1917), 244 U.S. 317, 319.)

The equal protection of the laws clause of the Fourteenth Amendment precludes California from keeping appellant imprisoned and from taking his life for the reason it has persisted in depriving him of the type of appeal afforded all others convicted of a capital offense, which is an appeal from a true, complete and certified transcript of the entire proceedings. (Dowd v. United States (1951), 340 U.S. 206, 210.)

The action of the California Supreme Court in depriving

appellant of his right to appeal from an accurate, complete, correctly certified and jurisdictionally prepared transcript of the trial record, without adequate opportunity to defend against that deprivation, was a denial of due process. (Shelley v. Kraemer (1948), 334 U.S. 1, 16.)

The California Supreme Court refused to order the record augmented to include proceedings had at the trial in which inhered federal constitutional questions on the ground those proceedings could not lead to a reversal (p. 466 of 35 Cal.2d). But that court could not properly avoid review by the federal courts of its disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. (Williams v. North Carolina (1945), 325 U.S. 226, 236; Reece v. Georgia (1955), 100 L.Ed.(Adv.Ops.) 109, 112.)

It is not simply a question of State procedure when a State court of last resort closes the door, as here, to any consideration of a claim of denial of a federal right. (Young v. Ragen (1949), 337 U.S. 235, 238.)

To conform to due process of law, appellant was entitled to have the validity of his convictions appraised on consideration of the case as it was presented to and determined by the trial court. (Cole v. Arkansas, supra, 333 U.S. 196, 202.) By using the disputed reporter's transcript as a basis for hearing the appeal, the California Supreme Court did not and could not appraise appel-

lant's convictions "on consideration of the case as it was tried and as the issues were determined in the trial court," and this being so, appellant "has been denied safeguards guaranteed by due process of law--safeguards essential to liberty in a government dedicated to justice under the law" (id., p. 202).

The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. (Roller v. Holly (1900), 176 U.S. 398, 409.)

Yet in People v. Chessman, supra, 35 Cal.2d 455 [218 P.2d 769, 19 ALR2d 1084], the California Supreme Court treated all of appellant's rights, including those constitutional rights he asserted, as matters exclusively within the exercise of its discretion to grant or withhold (see p. 460 of 35 Cal.2d).

The failure to guard and enforce constitutional rights is not answered by a substitution of the rationale that where "The record appears to contain ample evidence to support the verdict" (p. 463 of 35 Cal.2d), "it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been a miscarriage of justice" (p. 462 of 35 Cal.2d).

Not only is the guarantee of equal protection of the laws a pledge of the protection of equal laws (Yick Wo. v. Hopkins (1886), 118 U.S. 356, 369; Skinner v. Oklahoma (1942), 316 U.S. 535), but it is a like pledge of the

equal protection of equal laws (Cochran v. Kansas (1942), 316 U.S. 255).

Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which appellant has a right to demand. (Hill v. Texas (1942), 316 U.S. 400, 406.)

Inasmuch as California has provided appellate review in cases such as this, constitutional safeguards attached at all stages of the appellate proceedings and their violation compels the relief here sought.

II. APPELLANT WAS DENIED THAT TYPE OF HEARING ORDERED AND CONTEMPLATED BY THE SUPREME COURT OF THE UNITED STATES IN ITS MANDATE (350 U.S. 3) BECAUSE:

A. THE DISTRICT COURT REFUSED TO PERMIT THE TAKING OF DEPOSITIONS OF MATERIAL WITNESSES OR TO ORDER THEIR PRODUCTION.

Both the District Court and opposing counsel found opportunity to refer to appellant's attempts to secure and introduce evidence as "fishing expeditions" or "explorations" or "discovery proceedings."

Yet it is recognized that depositions may be used either to produce leads as to where evidence may be found or to produce evidence for use at the trial (Engl v. Aetna Life Ins. Co. (2 Cir., 1943), 139 F.2d 469).

On November 30, 1955, the District Court assured counsel for appellant that all process for the production of witnesses would be afforded (PTR. 20); and with or without

specific statutory authority, the Court indicated that it would make an effort to see that evidence it considered material would be produced. For example, on December 8, 1955, the Court suggested that the shorthand notes be secure without the necessity of a subpoena being issued (PTR. 60-6

Yet a perusal of the record shows that the only witness the Court desired to hear was Judge Neely (who, on learning he was to be called, suddenly remembered nothing), and it was he and he only whose production the Court offered to attempt to secure. With reference to all of the other witnesses whom appellant sought to produce to prove the allegations of his petition, the Court exhibited a total disinterest and refused to act, either by arranging for their production or by the taking of their depositions.

The witnesses whose testimony appellant sought to get before the Court and the nature of the testimony will be found at R. 151-153, 160-166, 167; see PTR. 227 et seq., 243-249.

As noted, every attempt by appellant in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by the Court (R. 157; HR. 552, 913-914; see PTR. 243-249).

And although, as shown above, the Court expressed a willingness to assist appellant in securing witnesses with or without statutory authority, it first subsequently declined to require the attendance of appellant's witnesses

residing in Los Angeles on the ground it had no power to do so, and then it next refused to use its unquestioned power to permit the taking of depositions of those witnesses.

If the District Court was right in the manner in which it kept appellant from proving his case, then the Supreme Court wittingly or unwittingly ordered a hearing that was meaningless. It necessarily said, "We are giving you a hearing in San Francisco, but of course you won't be able to compel the attendance of witnesses who live in Los Angeles or take their depositions. On the other hand, the State will be free to produce anyone it wants."

B. THE DISTRICT COURT DEPRIVED APPELLANT OF A FULL AND FAIR RESOLUTION OF THE ISSUES BY ITS RULINGS TOO NARROWLY AND PREJUDICIALLY RESTRICTING, OR EXCLUDING ALTOGETHER, MATERIAL, COMPETENT AND RELEVANT EVIDENTIAL PROOF.

The fundamental question of whether Mr. Perry's notes can or cannot be deciphered with any reasonable degree of accuracy, or at all, still has not been resolved. The District Court refused to permit it to be. Nor did the District Court permit the accuracy of the transcript as prepared by Mr. Fraser to be tested.

During the course of the hearings, the following occurred:

> "THE COURT: So that there won't be any misapprehension about it, I am not going to engage in a test of this proceeding of the accuracy of the record.

"MR. DAVIS: Or the ability of Mr. Fraser to read it?

"THE COURT: No, nor the ability of the man to do it." (HR. 248.)

And then, almost immediately following:

"THE COURT: Of course I don't know what he put down in the transcription [referring to Mr. Fraser].

"MR. DAVIS: That's why I am trying to find out.

"THE COURT: I don't think the Supreme Court of the United States intended me to spend in this court days or weeks of time in determining the accuracy of this transcript. Whether they did or not, I am not going to do it.

"MR. DAVIS: Well, could we have perhaps ten minutes on that?

"THE COURT: That is not an issue in this case. This man [Fraser] could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that." (Hr. 249.)

And then:

"THE COURT: That is right, I am not going to test his [Fraser's] ability in this proceeding or whether or not his statement that he transcribed this -- made this transcript correctly is correct or not. That would involve a technical adventure in the field of shorthand reporting which this Court is not equipped to do, nor which it should do in connection with a habeas corpus proceeding.

"If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it -- it could be -- it could be 75 percent wrong, and it wouldn't raise any federal question." (HR. 250.)

With these rulings and comments, appellant's case

literally went out the window virtually before the hearings got underway. (See also HR. 177.)

Stanley Fraser was obliged to admit that he could not read the shorthand notes from the stand (HR. 281 et seq.).

Paul Burdick, the State's well paid "expert" and admitted "warm friend" of those charged with the fraud (HR. 707-711), was forced to make the same admission and concede the notes were "shattered" (HR. 724-725) after having painted such a glowing word picture of how he had "checked" the transcript as prepared by Fraser against Mr. Perry's notes and found it to be such a marvelous job of transcribing (HR. 698-705).

But it is not the self-serving words of the principals that should control; it is whether or not the Perry notes actually can be deciphered. In his petition for the writ, appellant alleged they could not be. He still makes that claim. If the allegations of fraud are true, it would be naive of anyone to assume that those charged with the fraud would get on the stand and admit it. Yet, if appellant had been permitted to establish by Fraser that he in fact could not read the notes, then the proof of the fraud could hardly be more convincingly demonstrated.

Appellant attempted to establish that the prosecutor knowingly made sworn misrepresentations to the California Supreme Court to the effect that appellant would be produced when the transcript was settled, and the District

Court declared bluntly:

> "It doesn't make any difference whether that transcript was delivered to him [appellant] on the street, in his apartment or in jail if he got the transcript. I don't see anything material about the representation as to where it was delivered to him, at least for the purpose of this proceeding . . ." (HR. 510.)

And just prior to that, the District Court had said emphatically that "If there was a misstatement made as to the place of delivery of the transcript, I personally would determine that that is utterly immaterial."

But it was highly material. On it turned the question of whether appellant was wrongfully and fraudulently foreclosed from establishing the gross inadequacy of the Fraser transcript in the courts of California (see Point I-A and B, supra).

The testimony of appellant at the hearing, which stands uncontradicted in the record, shows that the transcript was incomplete and inaccurate with reference, among others, to the following matters, all of which raise issues of appellant's rights under the Federal Constitution, and all of which should have been determined by the State courts upon an accurate record: Testimony and evidence pertaining to the alleged coercion of appellant's "confession"; the testimony of Colin Forbes (with whom, significantly, Mr. Fraser found it necessary to confer in attempting to prepare the transcript); and testimony and statements in court by defendant and others, including the

judge and prosecutor, relating to the desire and attempt by appellant to secure counsel of his own choice. Yet, though all of these matters were at issue, the District Court limited the evidence -- and its consideration -- to the sole question of the disputed instruction alleged to have been given by Judge Fricke at a time when the jury returned with questions for him.

The District Court said (HR. 513):

> "But it is of sufficient seriousness and bears vitally on what, in my opinion, is the only real question in the case, and that is whether or not there were some instructions that were given and statements made by the presiding judge that are not included in the transcript."

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol (R. 11-12). And when questioned by counsel for appellant, Judge Fricke stated flatly: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages (HR. 890), and: "If I had even heard the rumor, I would certainly have gone and made an investigation to ascertain whether there was any foundation for it or justification for it."

Yet both before and during the hearings appellant repeatedly sought to produce the arrest reports of the FBI

and CII, as well as the files of the Los Angeles Police Department, to prove these allegations, and the District Court refused to require or permit their production and ruled them "inadmissible" (HR. 911, line 24, to 912, line 10; R. 147, item 5; R. 152, item 20; see R. 162, item 4). Appellant was also foreclosed from proving by hospital records that Fraser's excessive and chronic addiction to alcohol led to delirium tremens, hallucinations, attempted suicide and lengthy hospitalization (see R. 153, item 21; R. 162, item 5; R. 147, item 6; R. 150).

Nevertheless, by keeping this evidence out of court, the District Court found (R. 212):

> "5. It is not true that Fraser was incompetent to transcribe Perry's notes because of drunkenness or for any other reason. On the contrary, Fraser was exceptionally and specially competent."

Clearly, appellant lost his case solely because he was prevented from proving his charges.

C. THE DISTRICT COURT REFUSED TO ALLOW APPELLANT ADEQUATE TIME AND OPPORTUNITY TO PREPARE FOR THE HEARINGS BEFORE SUCH DEPRIVATION AMOUNTED TO A DENIAL OF DUE PROCESS OF LAW.

In its opinion and decision, the District Court stated (R. 206):

> "It is appropriate here to record the many collateral proceedings and matters initiated by petitioner from December 8, 1955, to and through the hearings themselves. Not because of any materiality to the resolution of the factual issue which the Court has determined, but to demonstrate the provisions made to afford petitioner a full and adequate hearing of the factual issues. A complete

list of the various applications and motions made by or on behalf of the petitioner, and the Court's rulings thereon, follows as Appendix A."

However, an impartial and independent examination of said applications and motions, with their supporting affidavits, and the District Court's rulings thereon, reveals plainly that appellant was denied adequate time and opportunity to prepare and effectively present his case in court. The treatment of appellant by those holding him at San Quentin, and the conditions that prevailed at the prison are set out fully in those affidavits filed by or on behalf of appellant in the District Court (see R. 60-79, 86-97, 89-98, 109-117; PTR. of November 30, December 8, 16, 21 and 22, 1955).

Importantly, not one counter-affidavit was ever filed. It took repeated and exahustive effort and almost three weeks from December 8, 1955, to win and induce respondent to grant a reasonable opportunity for appellant, his male counsel and his male witnesses and investigator to confer. Miss Asher was never allowed to see appellant except in the condemned man's visiting "cage," with a guard seated nearby and with a mesh screen separating her and appellant except for a small aperture that was opened.

During this time the undisputed affidavits show that appellant, his counsel and investigator were subjected to constant harassment and provocation. All of appellant's legal papers were thoroughly searched daily, often more

than once. Appellant was even once tried by an institutional disciplinary court for declining to submit "willingly" to a "skin shake" and a search of his papers in deliberate violation of the District Court's explicit order that such searches would not be made when appellant was going to or coming from a conference with counsel. Under such conditions, it was impossible to prepare.

The record of the proceedings prior to the hearings in this matter establishes without contradiction that the appellant was not, as a matter of fact and law, given the time and opportunity to prepare as commanded by due process. The provisions of the Sixth Amendment to the Constitution of the United States apply, but even apart from the guarantee there provided for, the Fifth Amendment also applies with full force and effect to the appellant, guaranteeing to him procedural due process. And an integral part of such due process is effective representation by counsel, which includes an opportunity for preparation (Powell v. Alabama (1932), 287 U.S. 45; Shapiro v. United States (Ct. Cl., 1947), 69 F.Supp. 205, 207). Moreover, the right is so vital that the party deprived of it need not prove with exactitude that he was prejudiced thereby (United States v. Venuto (3 Cir., 1950), 182 F.2d 519, 522; Glasser v. United States (1942), 315 U.S. 60).

The record also shows, both by way of affidavits which are a part thereof and by way of statements of counsel

made in open court, that conversations between appellant and counsel were overheard by agents of the respondent and that legal documents were examined by them. This operated to deprive appellant of the effective aid of counsel and, as a result, of due process of law (Coplon v. United States (App.D.C., 1951), 191 F.2d 749).

As to the District Court's offer to transfer appellant to Alcatraz, the affidavits of Mr. Davis, uncontradicted, show that appellant simply would have gone to solitary confinement and an even worse situation (R. 134-138).

Appellant waited 7 1/2 years for this hearing, and when he finally got it, the State and the Court suddenly got in a headlong rush to get the matter disposed of. Yet the State was never before in a hurry to have the charges tried. In fact, it bitterly resisted a hearing by every means at its command. These were serious, complex charges and new counsel had only taken the case in late October. Witnesses had scattered. They had to be located, if possible. There were literally thousands of pages of record and prior litigation to study. There were many files to be examined carefully. Yet many of these files, although public records, were kept closed to those working for appellant by one ruse or another. Appellant asked the Court to produce the files in advance of the hearing; the Court did not do so. Some were never produced. The remainder appellant never saw until the hearings actually started.

The District Court ordered the production of the shorthand notes and they arrived three days late. Then they were available only when the Clerk's office was open. Appellant's expert, whom he was never able to call, had only a few days to examine them. Yet the State delayed delivery of them while making photostatic copies, and it was able to give its well-paid "expert" unlimited time under the most favorable conditions to examine them.

This sort of hearing is not the kind that meets the standards of due process (Adams v. U.S. ex rel. McCann (1942), 317 U.S. 269, 279).

III. THE DISTRICT COURT PREJUDICIALLY ABUSED ITS DISCRETION, OVER APPELLANT'S OBJECTIONS, IN PERMITTING J. MILLER LEAVY TO APPEAR AS ONE OF THE COUNSEL FOR RESPONDENT.

Los Angeles County deputy district attorney J. Miller Leavy prosecuted appellant at the trial. His "overzealousness" and improper conduct, recognized by the California Supreme Court (39 Cal.2d 166, 177, nn. 2 and 3), helped to convince a jury it should twice doom appellant. After that, at the trial court's suggestion, Leavy found a court reporter to attempt to prepare a transcript of the trial proceedings from the dead reporter's shorthand notes. This reporter was his uncle-in-law, Stanley Fraser, a fact kept from the trial judge and appellant.

Leavy in effect supervised and directed preparation of that transcript in appellant's absence (See Point I-A,

supra). To be sure nothing interfered with the progress of this endeavor, when appellant sought a writ of prohibition against completion of the transcript from the California Supreme Court, Leavy swore to that court that appellant would be produced in court when the record was settled, although appellant never was produced.

On completion of the transcript, Leavy was commended by the trial judge for his worthy efforts. He was also charged by appellant with fraud. After years of litigation, a hearing on appellant's charges finally was ordered by the Supreme Court of the United States.

Although J. Miller Leavy was to be a material witness at this hearing and had a vital personal interest in its outcome (his job, future and reputation were at stake), the District Court permitted him to appear as one of the counsel for respondent over the strenuous objections of appellant (HR. 3-9). The District Court observed at that time (HR. 7):

> "The petitioner could well exclude all the officers of the government, law officers of the government, from acting as counsel in the cause by merely charging them with some conduct in the case."

What appellant <u>could</u> do and what he actually was attempting to do were two entirely different things. This appeal is not concerned with academic generalities or abstractions. The State Attorney General's office had literally dozens of lawyers it could assign, and appellant

certainly could not and would not object, as he did not object to Mr. Bennett and Mr. Smith, who appeared at the hearings on behalf of respondent.

Mr. Leavy actively--and at times theatrically--participated as counsel for the respondent as well as appearing as a witness in the proceedings. This former role prevented him from being excluded when other witnesses with whom he was charged with fraudulent conduct testified; it permitted him to hear the testimony, to dash to the witness stand, demand documents and interject comment.

Not only that, but Leavy questioned trial juror Nana L. Bull when she testified for the State. His appearance apparently was so reassuring that Mrs. Bull testified positively that the jury had found appellant--whom she went to great lengths to make everyone understand she considered an unspeakable person--guilty on all counts (HR. 808), when as a matter of fact shown by the evidence, appellant had been acquitted on one count!

The Canons of Professional Ethics, Canon 19, provide that excepting when essential to the ends of justice, a lawyer should avoid testifying on behalf of his client; and although generally the rule is that the propriety of allowing an attorney, including a prosecuting attorney, to testify, is largely within the trial court's discretion (70 C.J. 183, § 247; id., p. 175, § 233), here, under the peculiar facts of the case, permitting Mr. Leavy to

serve as counsel, with full and prior knowledge that he would be a material witness, was a prejudicial abuse of the District Court's discretion.

As said by the District Court in Nebraska (Frasier v. Twentieth-Century Fox Film Corp. (1954), 119 F.Supp. 495, 496):

> "The submission by counsel of themselves as witnesses upon important questions of fact in their cases is censurable and ought sternly to be discouraged."

IV. THE DISTRICT COURT ERRED, TO APPELLANT'S PREJUDICE, IN DENYING APPELLANT'S MOTION TO MAKE THE PEOPLE OF THE STATE OF CALIFORNIA A RESPONDENT IN THESE PROCEEDINGS.

In its opinion, the District Court lists the persons it states were called by and on behalf of appellant. Among those listed are Los Angeles County deputy district attorney J. Miller Leavy, the prosecutor of appellant, Stanley Fraser the substitute reporter, and Charles W. Fricke, the Los Angeles County Superior Court Judge before whom appellant was tried (R. 205).

In advance of the hearings, on January 7, 1956, appellant filed his "Motion for Permission to Make the People of the State of California a Respondent" (R. 127). The grounds of the motion as stated therein were:

> "1. The People of the State of California are in fact and in law the real party in interest.
>
> "2. It is the People of the State of California's officers, agents and judicial officers who

are charged with fraud, and unless the People are made a respondent, answerable directly to the Court, petitioner, through a technicality, will be foreclosed from calling and questioning these officers, agents and judicial officers as adverse parties, rather than as merely hostile witnesses, and thus petitioner will be kept from impeaching and not being bound by their testimony, as permitted by Rule 43(b) of the Federal Rules of Civil Procedure.

"3. Unless petitioner is released from this technicality and is permitted to call and question these adverse parties in fact as adverse parties he will be greatly handicapped, if not virtually precluded, in and from proving his charges."

The District Court, on hearing the motion, declined to make the People a respondent but withheld final decision (PTR. 220-224). The motion was renewed during the hearings and rejected (R. 215, item 9(a)). The District Court adopte the position that it was free to decide, at its pleasure, how much or how little latitude would be allowed in the exam ination of the three named witnesses--Leavy, Fraser and Judge Fricke--as well as free to exercise its own discretion, rather than being bound by Rule 43(b), FRCP, in determining the binding effect of their testimony upon appellant (see PTR. 191-193; HR. 173-176).

Squarely presented, as a result, is the question:

Does Rule 43(b), FRCP, apply to habeas corpus proceedings? (And, if not, is a petitioner in habeas corpus left wholly unprotected from the dilemma that confronted appellant?)

If appellant, through the denial of the motion, was and is bound by the testimony of the above three adverse

witnesses as a matter of law, then the District Court seriously erred in denying the timely made motion. If, conversely, appellant was not bound by their testimony, then he was denied the right, as appears from the record herein, to question them as adverse parties and impeach them.

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN RULING THAT, ON JURISDICTIONAL GROUNDS, IT COULD NOT AND WOULD NOT DECLARE APPELLANT'S RIGHTS UNDER 28 USC §§ 2201 AND 2202.

Under the provisions of 28 USC §§ 2201 and 2202, appellant filed an application for declaration of rights (R. 168), with supporting affidavits and exhibits (R. 170, 174, 198, 199). The purpose of the application was to secure a favorable ruling on appellant's right to reclaim his valuable literary property--the manuscript of an unpublished novel titled The Kid Was a Killer, authored by appellant--which had been seized by respondent and held against the will and over the protest of appellant, and the release of which would have enabled appellant, at the time compelled to proceed as a poor person, to produce his own expert witness, as well as other witnesses, and to bear the cost of litigation and pay for the photostating of the shorthand notes.

A second purpose of the application was to secure a judicial declaration that the agreement entered into between appellant and George T. Davis, one of his counsel,

was a valid one which respondent must permit appellant to honor. Therein appellant, an established author, agreed to do a biography of the life and career of Mr. Davis in return for the major portion of the latter's fee, but respondent had arbitrarily refused to allow appellant to do this writing, although appellant had no other means of securing the services of Mr. Davis, counsel in whom he had full trust and faith.

The Court summarily denied the application from the bench (1) on the primary ground that it had no "jurisdiction" to declare appellant's rights in a habeas corpus proceeding, and (2) on the second ground that it could not interfere with the "security regulations" at the prison (HR. 915-916).

The District Court was clearly wrong in holding that it was without jurisdiction to declare appellant's rights. The language of 28 USC § 2201 expressly empowers "any court of the United States . . . in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ." The section makes no exception of habeas corpus proceedings. Neither does Rule 57, FRCP, nor any case appellant has been able to find. Quite the contrary.[5]

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[5]See Moore, Commentary on the U.S. Judicial Code (continued)

Appellant is aware both of the policy of the federal courts to avoid deciding constitutional questions if possible and the sound reasons underlying that policy. But the policy wisely and swiftly gives way when to avoid deciding such questions would be to evade them and would operate to strip the litigant of hard-won constitutional safeguards. (See Rice v. Sioux City Cemetery (1955), 349 U.S. 70, 75.) Such is the case here, and the public importance of the resolution of the issues tendered by the application for declaratory relief could scarcely be more manifest.

Squarely involved are these freedom of speech, due process and equal protection questions: May a State, through one of its agencies, by administrative fiat, arbitrarily seize and deprive a citizen of his property? Similarly, may a State forcibly deny to any citizen the right to speak freely and to publish his sentiments on any subject, when that citizen remains responsible for

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(Matthew Bender & Co., 1949), p. 59, including footnotes 59-62 ["The declaratory judgment procedure operates like an 'expanded bill quia timet, meant to do in general what that suit did in its limited field.' In other words, by the creation of the new writ the area of adjudication is extended to cover any civil matter raising a justiciable case of controversy over which the federal courts have jurisdiction . . ."] In the federal courts, habeas corpus is a civil writ, Ex parte Tom Tong (1883), 108 U.S. 556; Cross v. Burke (1892), 146 U.S. 82; Fisher ex rel. Barcelon v. Baker (1906), 203 U.S. 174. Here the District Court had appellant in its custody and possessed undoubted jurisdiction over the subject matter both as to the merits and the sought declaration of rights.

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the abuse of the constitutional privilege? May a prisoner convicted in a State court of a capital offense be prevented by the State from honoring a contract for the services of competent counsel when the conviction under which he is held in custody for execution is assailed as having been obtained and upheld on appeal in violation of the 14th Amendment and when the Supreme Court of the United States has ordered a federal court hearing of the charges? May the State, in such circumstances, deny to the litigant-prisoner a right effectively to present competent evidence in proof of the charges by employing its naked power to seize, at its whim and pleasure, his valuable literary property and deny him all right to the use and sale of products of his mind? Are there, finally, two kinds of justice: a poor man's and a rich man's justice, a justice that impartially protects all and a "justice" that a State may withhold from anyone it does not like?

It is a curious situation when the respondent here, a State agent, can arbitrarily keep appellant from property that belongs to him and thus prevent him from financing a court fight to prove that other State agents are guilty of fraud.

Long ago the Supreme Court solemnly declared in Roller v. Holly (1900), 176 U.S. 398, 409:

"The right of a citizen to due process of

law must rest upon a basis more substantial than favor or discretion."

And in Louis. & Nash. R.R. v. Stock Yards Co. (1909), 212 U.S. 132, 144, the Court added:

> "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Substantial federal questions having been raised, no diversity of citizenship was or is necessary to give the federal courts jurisdiction; and even if the jurisdictional amount must be alleged, that requirement was met in the petition for declaratory relief (R. 186).

There being an actual controversy, a judgment might be granted, even though the rights might be contingent (Pennsylvania Casualty Co. v. Upchurch (5 Cir., 1943), 139 F.2d 892); and declaratory relief also may be granted either alone or in conjunction with another remedy (Petrol Corporation v. Petroleum Heat & Power Co. (2 Cir., 1947), 162 F.2d 327). Nor does the fact that there may be another remedy available operate to prevent declaratory relief being granted, if otherwise it is proper (Motor Terminals v. National Car Co. (Dist.Ct. Del., 1949), 92 F.Supp. 155). Even apart from the pendency of the habeas corpus issues proper, the District Court abused its discretion and prejudicially erred in denying declaratory relief.

Certainly, further, there was an "actual controversy" existing in the habeas corpus proceeding, and there still

is--that is, whether the death and other assailed judgments imposed by the California courts are void or valid under the Federal Constitution.

Lastly, a favorable declaration of rights would not overturn any "security regulations" at the prison. Appellant so alleged in his petition for habeas corpus to the California Supreme Court, summarily denied, and made a part of his application by being filed as a supporting exhibit (R. 184) . Moreover, this is a question of fact on which appellant is entitled to a hearing (see 28 USC § 2202). And present is a basic constitutional question--namely, whether arbitrary "security regulations," in no sense involving security, may take precedence over the federal constitutional guarantee that a litigant may employ and be effectively represented by counsel of his own choosing.

Federal constitutional questions being inherent in the complaint and relief having been denied by the State Supreme Court without a hearing, appellant was entitled to a hearing in the District Court on the constitutionality of the administrative rules promulgated and enforced by officers and agents of the State. The questions which the District Court should have heard and decided are whether these acts of the State operate 1) to deprive appellant of his property without due process of law, and 2) deprive him of the effective aid and assistance of counsel of his

choice.

VI. THE DISTRICT COURT PREJUDICIALLY ABUSED ITS DISCRETION IN REFUSING TO HAVE THE DEAD REPORTER'S SHORTHAND NOTES PHOTOSTATED AND FURNISHED APPELLANT WITHOUT PREPAYMENT OF COSTS.

By written motion, appellant, proceeding of necessity in forma pauperis, asked the District Court to order that the dead reporter's shorthand notes be photostated and furnished appellant without prepayment of costs (R. 145). When the hearings began, appellant renewed the motion, it not having been yet finally acted upon, making it under 28 USC § 2250 (HR. 15-17). The District Court said that section did not permit it to make such an order (HR. 17-18). The appellant believes it does, as the section states expressly:

> "If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of <u>such documents or parts of the record on file in his office</u> as may be required by order of the judge before whom the application is pending."

And surely it may and must fairly be said that these notes, in the possession of the clerk and the most crucial part of the record, were "parts of the record on file in [the clerk's] office" within the meaning of the section.

The District Court indicated there was another provision of which appellant might avail himself (HR. 19),

but appellant does not know what it is, and the District Court never said. So appellant was not able to secure photostatic copies of the notes for study by shorthand reporters because of his untimely poverty. Here again was and is "poor man's justice" at work.

Appellant asks the Court to rule on the applicability of 28 USC § 2250. For as the matter now stands, if a new hearing is ordered and appellant remains without funds, he will be unable to secure and use a photostatic copy of the notes solely because of his poverty.

VII. A. THE RECORD SHOWS, AS A MATTER OF LAW, A PERSONAL AND FIXED BIAS ON THE PART OF JUDGE GOODMAN AGAINST APPELLANT AND IN FAVOR OF THE STATE OF CALIFORNIA.

On December 29, 1955, appellant filed an affidavit under 28 USC § 144 to disqualify Judge Goodman from hearing and deciding the cause on the ground Judge Goodman entertained a personal and fixed bias against appellant and in favor of the State of California and its agents (R. 101-118). As required, counsel's certificate was filed with the affidavit (R. 119).

Appellant particularly asks the Court to read that affidavit. The facts set out therein have never been disputed or denied, for in his disposition of the motion Judge Goodman did not deny the allegations but merely based his ruling on the grounds of a technical insufficiency of the

affidavit. Those facts and the subsequent rulings, actions and attitude of Judge Goodman as shown by the record, this brief and the application for certificate of probable cause (R. 238-244) bring this case within the orbit of the rationale of In re Murchinson (1955), 349 U.S. 133. There the Supreme Court said (p. 136):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14."

Here the hearing judge was personally embroiled and exercised (cf. Offutt v. United States (1954), 348 U.S. 11); here, complaining because the case was in the federal courts and referring to his court as a laundry, he had an announced and determined intention to repudiate appellant and vindicate his position. Here he declared he didn't care what the Supreme Court intended; he was going to proceed in his own way. Here the intemperate language

of his earlier opinion (128 F.Supp. 600), asking rhetorically "What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public hysteria and prejudice (see R. 101-105).

By his actions and language, Judge Goodman had committed himself to a position from which he would not or could not retreat. His personal interest in the outcome of the case from that point was necessarily and patently "substantial" (see 28 USC § 455). In June, 1955, his motion to change the habeas corpus law and shut appellant out of the federal courts altogether was made to the conference of the judges of this circuit. On July 1, 1955, the San Francisco Chronicle front-paged and featured a story by Tom Benet which read in part as follows:

> "A move to outlaw the bulk of Federal Court writs filed by convicted state felons such as Caryl Chessman, San Quentin's condemned author-convict, was unanimously endorsed by Federal Judges of the Ninth Circuit yesterday."

The story quoted Chief Judge Denman to the following effect:

> "'You might be interested in the sort of letters I got because I found there was probable cause for the appeal [from Judge Goodman's angrily worded decision denying habeas corpus, referred to above and later reversed by the Supreme Court],' the white-haired justice told the conference. 'One began: Dishonorable Denman. You ------. All that a rapist has to do is come into your court and you give him everything he asks.'"

And the story significantly stated further:

"The recommendation for the change in the law was presented to the conference by Judge Louis E. Goodman."

Here, when the question of the propriety of him hearing the case was raised by appellant's counsel, Judge Goodman took up the matter of appellant's proposed transfer to the San Francisco County Jail pending the hearing and said without qualification that appellant was entitled to the order and that he would make it. Thereafter, he refused to do so, even when counsel for respondent joined in making the motion.

Here Judge Goodman denied to appellant adequate time and opportunity to prepare; he insisted on a hasty disposition of the matter "irrespective of anything else." He refused to allow the crucial and primary question whether the dead reporter's shorthand notes are or are not decipherable to be resolved. He prejudicially limited the issues. He would not order the subpoenaing of material witnesses or permit their depositions to be taken. He allowed the trial prosecutor, a party charged with fraud and a key witness in the proceedings with a personal interest in their outcome, to appear and actively participate as one of the counsel for respondent. He refused to declare appellant's rights, acting summarily from the bench.

Under such circumstances, Judge Goodman's decision in the case was a foregone conclusion from the outset.

B. JUDGE GOODMAN, ON THE FILING OF THE AFFIDAVIT TO DISQUALIFY, SHOULD HAVE PERMITTED ANOTHER DISTRICT COURT JUDGE TO PASS ON THE DISQUALIFICATION IN THE MANNER PROVIDED BY 28 USC § 144.

Judge Goodman declined to disqualify himself and ordered appellant's affidavit stricken on technical grounds (R. 120, 122).

The affidavit had been filed more than 10 days before the scheduled hearing and thus was timely (28 USC § 144). It would hardly have been possible to have filed it earlier and still set out all of the pertinent and objective facts on which it was based. The disqualification, further, would not have interfered with the regular hearing and disposition of the case.

Fairly read in the light of In re Murchinson (1955), 349 U.S. 133, and Berger v. United States (1921), 255 U.S. 22, and cases there cited, the affidavit does reveal both a personal bias and a personal interest on Judge Goodman's part as claimed and this should have resulted in his letting another District Court Judge pass on the matter of his disqualification in the manner provided by statute in such cases.

CONCLUSION

Appellant is entitled to be discharged from custody on the ground he was denied due process of law and the equal protection of the law because he was not permitted to be present or represented by counsel at the time the disputed reporter's transcript was settled and because the courts of California gave him no opportunity to defend against that transcript. (Point I, supra.)

If his discharge on this ground should not be ordered, appellant is entitled to further hearings in the District Court on his fact claims the disputed transcript was fraudulently prepared and is so garbled and incomplete that appellant was foreclosed from establishing on his mandatory appeal to the California Supreme Court his convictions had been obtained and were affirmed in violation of the Fourteenth Amendment to the United States Constitution.

Such a further and searching judicial inquiry is indicated in the alternative because appellant was denied that type of full and fair habeas corpus hearing contemplated and ordered by the Supreme Court of the United States in its mandate. (Points II, III, IV, VI and VII, supra.)

The hearing, in fact, was one in name only.

The District Court, wrongly, on jurisdictional grounds, denied appellant's application for a declaration of rights under 28 USC §§ 2201 and 2202. (Point V, supra.)

WHEREFORE, appellant prays this Honorable Court to

reverse the order of the District Court--discharging the writ and remanding appellant to custody--with appropriate directions.

Dated: May 7, 1956.

Respectfully submitted,

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In Propria Persona

NO. 15092

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARYL CHESSMAN,

Petitioner and Appellant,

vs.

ARLEY O. TEETS, Warden, California
tate Prison, San Quentin, California,

Respondent and Appellee.

APPELLANT'S CLOSING BRIEF

ppeal from an Order of the United States District Court,
Northern District of California, Southern Division,
by the Hon. Louis E. Goodman, District Judge,
Discharging a Writ of Habeas Corpus
and Remanding Petitioner to the
Custody of Respondent.

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NOTE

As in Appellant's Opening Brief:

The Transcript of Record from the District Court ll be referred to as R. ---.

The Reporter's Transcript of the pre-trial proceed- gs (pre-trial record) will be referred to as PTR. ---.

The Reporter's Transcript of the hearings (hearing cord) will be referred to as HR. ---.

The Reporter's and Clerk's Transcripts on appeal to e California Supreme Court will be referred to as Rep. . --- and Cl. Tr. ---.

The original exhibits before the District Court ll be referred to as Pet. Ex. --- and Resp. Ex. ---.

Unless otherwise indicated, emphasis has been added appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YL CHESSMAN, Petitioner and Appellant, vs. LEY O. TEETS, Warden, California te Prison, San Quentin, California, Respondent and Appellee.	No. 15092

APPELLANT'S CLOSING BRIEF

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PRELIMINARY STATEMENT

A full reply to Appellee's (Respondent's) Brief will made under Argument, below, with one important exception uiring immediate notice.

Under Point I of his argument appellee warden, hereinr called respondent, asserts:

> "The trial [District] court has held hearings and made findings on these issues [as ordered by the Supreme Court in Chessman v. Teets, 350 U.S. 3]. Appellant does not object to the propriety of the findings that there was no fraud or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence." (Resp. Br. pp. 5-6.)

This statement is seriously misleading. It seemingly calculated to convince this Court, in effect, that bese, so respondent claims, appellant does not challenge

e District Court's findings as such, the appealed order y be affirmed without further consideration.

But appellant's procedural attack upon the order is en more fundamental than would be an attack upon the ndings.

It is this:

Appellant was unable to prove his charges conclusively cause the wrongful acts, conduct and rulings of the strict Court prevented him from doing so. Such being e case, the hearing itself was, and the findings based on it are, neither binding upon appellant nor determina- ve of the issues raised by the appeal. The hearing, in ort, was one in name only; accordingly, it patently is not e legal sufficiency of the findings but is the sufficiency the hearing itself that is fatally defective. This ct appellant made abundantly clear in his opening brief, t respondent has either failed or refused to perceive it.

(A second, non-procedural but, constitutionally, equally ndamental attack requiring a discharge from custody is sed upon established and undisputed facts of record. is attack deals with the procedure employed by the State urts in procuring, settling and using the trial record appeal and is presented first, under Points I and II, st below; Points I-A and B, App. Op. Br.)

Respondent in his brief finds no fault with or error appellant's "Statement of the Case and the Facts" as

nd in the opening brief (pp. 2-11). However, to tify his own highly selective and greatly truncated sion of the case and the facts, respondent asserts fatorily:

> "Since petitioner has not attacked the sufficiency of the findings of fact, no detailed summary of the evidence produced at the trial [hearing] will be made." (Resp. Br., Statement of Facts, p. 3.)

This claim that the facts need only be sketchily sidered has been disposed of just above. It is not rect, All the facts set out in Appellant's Opening ef are most essential to a proper determination of the eal.

Because of the importance and complexity of the mat- s in issue, because eight years of litigation and erally thousands of pages of documents and court records involved, and because respondent has elected baldly advance incompetent claims that take only a few lines make but often require a page or more to refute, this sing (reply) brief necessarily will run more than 20 es. Accordingly, as required by Rule 2(e), Rules of s Court, because of its greater length, leave is hereby pectfully sought to file it.

Appellant's answering argument follows.

ARGUMENT

I APPELLANT WAS NOT PERMITTED TO ESTABLISH INADEQUACIES AND OMISSIONS IN THE DISPUTED REPORTER'S TRANSCRIPT, WAS NOT PERMITTED TO BE PRESENT OR REPRESENTED BY COUNSEL AT THE TIME OF ITS SETTLEMENT (OR AT ANY TIME), AND WAS NOT PERMITTED TO PRODUCE WITNESSES OR TO TEST THE ABILITY OF THE SUBSTITUTE REPORTER TO TRANSCRIBE THE DEAD REPORTER'S NOTES.

(App. Op. Br. pp. 15-19)

(Resp. Br. ???)

Respondent does not, and appellant believes cannot, allenge directly either the law or the facts set out der this point in Appellant's Opening Brief.

Rather, passing that law and those facts, respondent gues at length that the procedure used to prepare and ttle the record has been adjudicated as constitutional, y not therefore be readjudicated, and that this contested ocedure is not violative of either constitutional due ocess or equal protection of the law.

This argument will be answered under Point II, just low. Once examined, it will be seen to leave appellant's iginal contention, as presented under Points I-A and B the opening brief, in full force. In fact, respondent's proach to the point serves to emphasize the validity appellant's claim.

II THE COURTS OF CALIFORNIA DENIED TO APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN ORDERING PREPARED, SETTLING, AND ACCEPTING FOR USE ON APPEAL SUCH A REPORTER'S TRANSCRIPT OF THE TRIAL PROCEEDINGS, USED AS A BASIS FOR AFFIRMING THE DEATH AND OTHER JUDGMENTS, WITHOUT GIVING APPELLANT ANY OPPORTUNITY TO DEFEND AGAINST THAT TRANSCRIPT.

(App. Op. Br., Point I-B, pp. 19-25)

(Resp. Br., Point II, pp. 6-13)

Without regard for the facts and the law upon which s point is based, respondent interposes what he terms ee "answers" to appellant's contention. These will considered and refuted in the order respondent has sented them.

A. THE QUESTION OF THE CONSTITUTIONALITY OF THE DISPUTED PROCEDURE USED TO PREPARE AND SETTLE THE RECORD MAY AND SHOULD BE DECIDED ON THIS APPEAL.

Respondent initially argues that "The constitution- ty of the procedures used to settle the record has n adjudicated," and that "Policy demands an end to igation." (Resp. Br. p. 7.)

First. "Policy," however, of whatever kind or variety, es no demand for a wrongful, unjust or unconstitutional to litigation. Further, this litigation can be ended more effectively by squarely deciding the question on merits than by refusing to decide it.

Second. Decisions in habeas corpus from State courts not res judicata. (Brown v. Allen, 344 U.S. 443, 457,

; see Price v. Johnston, 334 U.S. 266, 291; dissenting
nion of Judge Stephens in Price v. Johnston, 161 F.2d
.) Where the ends of justice will be served by a suc-
sive inquiry, 28 USC § 2244 specifically authorizes the
ge or court to make such an inquiry, and the Supreme
rt has expressly so held (Brown v. Allen, supra, 508).

Third. Chief Judge William Denman of this Court
sidered the point so important that, in granting the
uired certificate of probable cause to appeal, he de-
ed virtually all of his strongly-worded opinion in
port of the awarding of that certificate to considera-
n of the point, emphasizing he believed it did definitely
sent a justiciable jurisdictional question under the
rteenth Amendment. (See R. 252-254.)

Fourth. As further evidence of the public importance
the question, on June 28, 1956, at the regular yearly
ference of the judges of this circuit, 50 of 51 of
se participating joined in a resolution authorizing a
dy of the Chessman case to produce recommendations that
ld prevent a similar development in Federal criminal
es and further urged legislation by Congress that would
ower Federal judges to grant a new trial should the
rt reporter die, become disabled, or his notes be lost
destroyed during criminal proceedings.

Fifth. The point has never been squarely decided by
Federal courts on the merits and on all the facts.

is the first time all the State court records in the have been before this Court, or, with the exception he court below, before any Federal (or State) court. More than Chessman v. Teets, 221 F.2d 276, 278, de- s the question, it simply announces mistaken reasons fragmented parts of it should not be decided.

Further, this decision was reversed by the Supreme t on certiorari (Chessman v. Teets, 350 U.S. 3), and akes tortured reasoning to say, as respondent unex- edly does, that the Supreme Court "impliedly adjudi- d [and rejected] this issue by ordering a hearing ly on the question of fraud and collusion in the lement of the record." The former point was and is ssarily embraced in the latter.

Moreover, the instant petition for the writ, raising points, was filed in the District Court only after Supreme Court had denied certiorari to the California eme Court (where an almost identical petition was ght up for review, In re Chessman, Crim. 5632) "without judice to an application for a writ of habeas corpus n appropriate United States District Court." (Chessman eets, 348 U.S. 864.)

Hence, the Supreme Court has held that the point pre- s a justiciable question, and respondent's unwarranted m--"Of course, the United States Supreme Court likewise liedly approved the procedure used in prior decisions"--

absolutely not true, for this is the only prior decision re is. In all certiorari proceedings in the case prior that (i.e., Chessman v. California: 340 U.S. 840, 341 929, 343 U.S. 915, and 346 U.S. 916), the Supreme t refused to review, and it is well settled that such sals import no opinion on the merits. (Brown v. Allen, U.S. 443, 490-491, 497, and cases cited.)

Respondent also says that "The question was expressly sed in the case of People v. Chessman, 35 Cal.2d 455," "The Supreme Court denied certiorari. (340 U.S. 840.)" is no more than another of respondent's ill-considered epresentations.

Chessman v. California, 340 U.S. 840, was not a cerari proceeding seeking review of People v. Chessman, al.2d 455. Rather, review was sought of a petition writ of habeas corpus filed as an aid of appellate sdiction and summarily denied by the California Supreme t (In re Chessman, Crim. 5110). Since appellant then not exhausted his state remedies and the review ht was premature, the Supreme Court could not then reached the merits on certiorari had it wanted to. USC § 2254.)

B. THIS INVENTED AND MAKESHIFT PROCEDURE DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Respondent next argues that "The procedures used by

State did not deny appellant due process or equal
tection of the law." (Resp. Br. p. 7.)

In support of his claim, after fatally conceeding
"appellate procedures must not be discriminatory,"
pondent declares that "The procedure for the settlement
record where a court reporter dies before transcribing
notes was set out in People v. Chessman, 35 Cal.2d 455.
was and is the law of California. This procedure was
onable, and in no way discriminatory as to Chessman."
phasis respondent's.)

This is a badly ill-advised and completely incorrect
m. The procedure employed in preparing and settling
transcript positively was not the law of California.
r, in accepting the transcript while denying appellant
aring at which he might test its validity and adequacy,
California Supreme Court conceded that the transcript
prepared in a situation for which the Rules on Appeal
ot expressly [or even impliedly] provide" (p. 458 of
al.2d). It should be kept in mind that the trial
e directed its preparation, not by any known law or
, since none existed, but by "human ingenuity," to
e his own words of record. From beginning to end,
methods employed were ad hoc and makeshift.

What might happen should another court reporter die
re transcribing his notes in a capital case in this
e is anyone's guess. Certainly People v. Chessman,

al.2d 455, doesn't put the question at rest. Further, type of appeal to be accorded a condemned appellant ixed by the State Constitution and its Penal Code (see Op. Br. pp. 15-16) and the power to make implementing s governing appeals is vested in the State's Judicial cil, not its Supreme Court (Const. of Calif., Art. VI, ; Calif. Pen. Code, § 1247k).

Finally, respondent's argument seems to boil down to : because the State did produced, settle and use a record orts on appeal, rather than no record at all, appellant ask and due process and equal protection may demand no .

What respondent is necessarily saying, under the sputed facts of this case, is that it is all right to uce a record by "human ingenuity," in contravention of established, controlling and settled State law; to gate, not to some impartial party, but to the prose- r, the unsupervised authority to select a substitute rter to prepare such a record of the trial proceedings; et the prosecutor select his own uncle-in-law, and keep fact carefully concealed from the trial judge, the llant and the reviewing court; to let the prosecutor the substitute reporter consult on the transcription of court; to grant the substitute reporter unlimited to prepare the record; to let him talk to detectives-- trial witnesses for the prosecution--out of court,

ng these talks as a basis for preparing a transcription
their testimony, at the suggestion of the prosecutor,
keep this fact from the trial judge, the appellant,
the reviewing court; to let the substitute reporter
pare the transcript in rough draft form, the rough
ft never being seen by the trial court or appellant,
hough appellant formally had asked to be furnished a
y, and then, also out of court, to permit the prosecutor
"check" the draft before it was copied in final form;
let the prosecutor swear to the reviewing court that
ellant (representing himself and held at a State prison)
ld be produced in court when the record was settled and
er let the trial judge know of this sworn statement; to
the reporter more than three times the statutory fee
his work; to hold hearings on the settlement of the
ord with neither appellant nor counsel representing him
sent; to have appellant's motions to be present and
llenge the transcript and the ability of the substitute
orter to transcribe the dead reporter's notes denied by
reviewing court without prejudice and ignored by the
al court; in the absence of appellant to proceed to
e witnesses testify and settle the transcript; to have
trial judge "approve" such a record without testing the
petence of the substitute reporter to decipher the dead
orter's notes, although the trial judge knew the local
erior Court Reporters' Association officially had gone

record that other court reporters had examined the notes found them to be indecipherable in material part; to e this disputed record accepted by the reviewing court used as a basis for affirming death and other judgments, hough it was not certified to be complete and correct required, but only correct to the best of the substi- e reporter's ability; and to never allow appellant to end against the use of that transcript or to establish, he claimed, that missing from it, or garbled in the nscription of it, were sections in which it should have irmatively appeared that appellant had been convicted violation of fundamental constitutional rights.

This, to say the least, is a singular definition of process and equal protection of the law. (See cases ed, contra, App. Op. Br. pp. 20-24.)

As stated by the late Mr. Justice Jackson in a separate nion in Brown v. Allen, 344 U.S. 443, at 546: "But I w of no way that we can have equal justice under law ept we have some law." The use of "human ingenuity," the prosecutor, whose avowed purpose was to see appel- t executed, is certainly no substitute for law.

The Fourteenth Amendment does not permit a State to y equal protection of its laws because such denial is wholesale. (See concurring opinion of Mr. Justice nkfurter in Snowden v. Hughes, 321 U.S. 1, 15-16.)

Contrary to respondent's claim, independent research

a study of the texts and other references cited by pondent does not disclose a single instance where, in eath case, the record has been prepared by the unique disputed means employed in this case. Moreover, we e are dealing with a situation where an appeal is manda- y, rather than being merely discretionary or a matter grace. Argument flowing from discarded methods of pre- ing appellate records under wholly dissimilar facts and is hardly persuasive or determinative of any issue sed here.

Here the relevant facts, all of record, are not in pute, whatever interpretation or misinterpretation the trict Court and respondent may have placed upon them, or ever both may have wed them to unrelated and disputed ts, and when such is the case "the appellate court free to consider them and to reach its own conclusion un- mmeled by the District Court's findings and conclusions law." (O'Brien, "Fourth Cumulative Supplement to Manual Federal Appellate Procedure," p. 70, 3d Ed., 1948.)

Neither is this Court bound by decisions or findings the State courts. Since the California Supreme Court acting within its jurisdiction, whether as a matter State law it decided the question of the validity and quacy of the transcript correctly or incorrectly, its ision finally decides the question and defines appel- t's rights under State law (Hebert v. Louisiana, 272

S. 312, 316.) But the Supreme Court (and Circuit urt) has constitutional power to inquire whether the ate law, as construed and applied, has afforded appel- nt due process and equal protection of the law (Hebert Louisiana, supra; Buchalter v. New York, 319 U.S. 427, 9); and such an inquiry and decision cannot be fore- osed by the prior finding of the State court; the Federal urt will independently examine the facts and reach its n conclusion (Norris v. Alabama, 294 U.S. 587, 590; oven & Allison Co. v. Evatt, 324 U.S. 652, 659; Niemotko Maryland, 340 U.S. 268, 271).

As decisively held by the Supreme Court in the recent se of Reece v. Georgia, 100 L.Ed.(Adv.Ops.) 109, 112:

> "We have jurisdiction to consider all the substantial federal questions determined in the earlier stages of the litigation (citation), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citation.)"

C. THE RECORD AFFIRMATIVELY ESTABLISHES THAT APPELLANT HAS NOT WAIVED, BUT HAS VIGOROUSLY AND CONSISTENTLY ASSERTED, HIS RIGHT TO BE PRESENT (OR REPRESENTED BY COUNSEL) IN THE STATE TRIAL COURT AT THE TIME THE RECORD WAS SETTLED.

Respondent claims that "Any alleged denial of due ocess by virtue of the fact that appellant was not sent at the settlement of the record in the State rt has been waived." (Resp. Br. p. 13.)

An examination of the facts appearing affirmatively

record reveals conclusively that appellant did not
ve his right to be present at the time the transcript
settled. On the contrary, he expressly sought to be
ent, and it will be shown that he had a clear consti-
onal right to be present and, at his option, to be
esented by counsel.

At the outset it may be conceded that if the disputed
iscript had been prepared in accordance with the rules
statutes governing appeals appellant would have had no
t personally to be present at the time of its settle-
. But it was not so prepared; the means employed were
nted and wholly unknown to the law, as shown. If the
e could claim the right to so proceed, permitting the
iscript to be prepared under the direction of the pro-
itor, and by his own uncle-in-law, it must concede
llant had the right, which was denied him, to test
transcript's validity and adequacy.

Appellant could only have done so at the time of its
lement (or at a subsequently ordered State court hear-
, for appellant's attempt in the California Supreme
t to prohibit preparation had failed when the prose-
r had sworn to that court appellant would be present
personally allowed to participate in its settlement
he superior court. Appellant then was representing
elf, and had the unquestioned right to do so (Carter
llinois, 329 U.S. 173, 174). He was being held at

Quentin and his motion to the State Supreme Court to er his production at the settlement proceedings in the erior court was denied without prejudice (doubtless ause that court believed the superior court would order ellant produced, since the prosecutor had sworn it would).

Appellant, however, was not produced; his motion to present, question hostile witnesses, test the ability the substitute reporter to transcribe the notes, chal- ge the validity of the methods employed in preparing transcript and establish prejudicial inaccuracies and ssions in that transcript was simply ignored by the trial ge, who proceeded to hold hearings, permit witnesses to called and examined, settle the transcript, "approve" and order it transmitted to the State Supreme Court -- in the absence of appellant or counsel acting in ellant's behalf.

In deciding mesne proceedings then instituted by ellant, the California Supreme Court, although placing burden of proving the prejudicial inadequacy of the quely prepared record on appellant, denied appellant's ion for hearings in the superior court at which he might just this, and without more accepted the transcript for on appeal (People v. Chessman, 35 Cal.2d 455).

Since "Neither the historic conception of Due Process the vitality it derives from progressive standards of tice denies a person the right to defend himself,"

ther does it deny him the right to defend against
h a transcript. (Carter v. Illinois, supra, at 175.)

Where the accused is defending himself, the trial
ge must be particularly alert to see that the accused
not overreached and taken advantage of (Gibbs v. Burke,
U.S. 773, 781). But here, by not producing appellant
offering him counsel when the record was settled, the
al judge himself was the person responsible for appel-
t being overreached and taken advantage of.

The essential elements of due process of law are
ice and adequate opportunity to defend (Louisville, etc.,
Co. v. Schmidt, 177 U.S. 230, 236; Simon v. Craft, 182
. 427, 436). Yet appellant was never allowed to defend
inst the transcript, either in person or through counsel.

While the State Supreme Court offered to appoint
nsel for appellant to argue the mesne proceedings be-
e it, the superior court never offered appellant counsel
the time the record was settled, although appellant
er waived his right to counsel. He had no occasion to
so, since up until the time hearings on the settlement
an, appellant believed he would be produced and allowed
participate personally in those proceedings.

A waiver of counsel in a capital case is not compe-
t when it is involuntarily and negatively brought about
arbitrary, extrinsic causes. To be effective, "it must
intelligently, competently, understandingly and volun-

ily made." (Bute v. Illinois, 333 U.S. 640, 675.)

II APPELLANT WAS DENIED A FULL AND FAIR HEARING BY THE DISTRICT COURT.

A. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO SUBPOENA OR ORDER THE DEPOSITIONS TAKEN OF WITNESSES WHOSE TESTIMONY WAS MATERIAL, COMPETENT AND RELEVANT; THIS ALTERNATIVE COURT PROCESS WAS FIRST SOUGHT LONG BEFORE, NOT AFTER, THE HEARINGS GOT UNDERWAY.

(App. Op. Br. pp. 24-26)

(Resp. Br., Point III-A, pp. 16-17)

If, as respondent says, "It should appear clear that District Court had no power to issue subpoenas for production of witnesses," then a more persuasive son why the District Court should have allowed deposi- ns to be taken could not be presented. But that court used either to order the production (or, with one ex- tion, even request the production) of witnesses whose timony was vital, or to permit depositions to be taken.

The result was that appellant was foreclosed by any every means from getting most of his evidence before court. Respondent does not dispute appellant's showing the opening brief but, rather, seeks to get around it a gross misrepresentation of the facts.

Respondent would have this Court believe appellant ted until four days after the hearings had begun to depositions or have subpoenas issued, and that this the only such attempt made. Actually, however, this

the next to last of repeated attempts to secure such ernative court process, as the record clearly shows. l before the hearings started appellant's counsel even sed the possibility of moving the place of hearing to Angeles, if no other way was open to secure vital timonial evidence (PTR. 209 et seq.).

On January 9, 1956, appellant sought without success secure the immediate production of relevant public ords (R. 146-148). On that same date appellant filed "Petitioner's Witness List and Application for Court ered Issuance of subpoenas" (R. 151-153). This appli- ion was denied without prejudice (R. 157).

Even before that and on the first day the case was igned to Judge Goodman, which was November 30, 1955, ellant's counsel took this matter up with the court. was again taken up on December 30, 1955 (see PTR. 209-), and the court stated: "I think there is some pro- ion in the statute for bringing [in] witnesses from side the district," but did not identify the provision. again on January 9, 1956, appellant's counsel argued length, but vainly, for the issuance of court-ordered poenas (PTR. 242-252).

Having made every effort prior to the hearings for cess to produce his witnesses and failed, appellant ed his "Motion for Order for Issuance of Subpoenas Process for the Taking of Depositions" on January 19,

6 (R. 167), with supporting affidavit (R. 160-166). s motion, too, was denied (R. 215; HR. 511). Last, January 24, 1956, appellant filed his motion for laration of rights (R. 168-169), with supporting ibits (R. 170-197) and affidavits (R. 198-203), by ch he sought, among other things, to be able to pay costs of producing his witnesses (R. 201-202). The lication was summarily denied (HR. 916).

B. THE DISTRICT COURT KEPT APPELLANT FROM PROVING HIS CHARGES.

(App. Op. Br. pp. 26-31)

(Resp. Br., Point III-B, pp. 17-20)

(1) Here respondent argues that black is white. The ord does show that the District Court did refuse to mit the accuracy of the transcript as prepared by the stitute reporter to be tested, and that the District rt, further, did refuse to permit the all-important stion of the decipherability of the notes to be resolved. Stanley Fraser, the substitute reporter, was the first ness called (not counting various witnesses who brought rt records for identification). Almost at the outset counsel for appellant's interrogation of Fraser, the trict Court told counsel flatly it was not going to w the accuracy of the transcript or the ability of er to transcribe the notes to be tested. The court, act, was so bluntly emphatic that it went so far as to

te that it didn't intend to permit either, whether Supreme Court had intended it to do so or not. The trict Court added that Fraser "could have been the t incompetent reporter in the world and he could have e a mess of the transcript," and the "transcript could 75 percent wrong, and it wouldn't raise any federal stion." (HR. 248-250.)

What could be clearer? How could appellant object the exclusion of evidence when, at the outset, the rt announced it wouldn't even allow the subject to be sidered? Respondent's argument is incredible in the ht of the record.

As well, the gratuitous speculation in Respondent's ef as to why appellant did not have his expert witness tify is refuted by the record. The reason this witness not testify is very simple: appellant exhausted his ds and credit before the hearings began, was thereafter pelled to proceed in forma pauperis, and the expert fined to testify unless he was paid in advance for his ert testimony (R. 198, 201).

Equally gratuitous and unwarranted is the inference pondent would have this Court draw from counsel for ellant's statement regarding the many errors this ex- had found. These errors dealt largely with omissions shown against the transcript): that is, with places the notes where whole sets of symbols, line after line

hem, had been left untranscribed, or where words and ences had been supplied in the transcript for wholly tered or missing notes, and rather than raising any umption that the notes could be transcribed, they ctively refute such a presumption (see R. 199-201).

It is true that "Petitioner did not avail himself the] offer" of the District Court "to put the substi- court reporter in his chambers in order to permit to work on the transcription of a page of the original s." An examination of the circumstances leading up his offer, as disclosed by the record, immediately als why: under the conditions imposed, the test would proved or decided nothing. (See HR. 285-292.)

(2) Respondent misses the point entirely. He asserts: [District Court] was correct in ruling that any mis- ement made as to the place of the delivery of the iscript was immaterial."

The place of delivery, per se, may have been rela- ly unimportant; but the sworn misrepresentation by prosecutor to the effect that appellant would have transcript delivered to him in court at the time of settlement was crucially important. This false state- , made under oath to the California Supreme Court, lted first in that court permitting preparation of the script to go ahead when appellant sought a writ of ibition to halt preparation. It resulted, next, in

court denying without prejudice appellant's motion an order requiring his production in the superior t at the time the record was settled, since that court been told under oath by the presecutor, an officer he superior court, that the superior court would uce appellant. But appellant wasn't produced; his on to be produced was ignored by the trial judge, and record was settled, with the prosecutor actively par-pating in the proceedings, in the absence of appellant nyone representing him. And the prosecutor never told trial judge, then or ever, of this false statement. as content, rather, to benefit by his own wrong.

Had the prosecutor either not made such a false ement under oath, or had he told the trial judge of the course of the proceedings and the end result un-tedly would have been entirely different. The harm by it and the prosecutor's significant silence with ect to it was incalculable. Judicial sanction of false swearing puts a premium upon trickery.

Respondent claims that the prosecutor "did answer question [as to this affidavit] later in the proceed-in the District Court. But all the prosecutor did seek to excuse and minimize what he had done by claim-he had been mistaken about what the rules required 543), and appellant's counsel was not permitted to ow through in the examination and show the grave preju-

suffered. Further, the District Court earlier had
n occasion to comment that comments of the prosecutor
t nothing because they were simply the statements by
ttorney in a case.

Yet here the prosecutor was far more than that. He
the agent of the State - the person designated by the
l judge to find a reporter to undertake to transcribe
dead reporter's notes - the individual who, acting
r color of this authority, selected his own uncle-in-
- the one who negotiated the special contract with
Board of Supervisors at three times the statutory
for his uncle-in-law, who sought all the extensions
ime for preparation his uncle-in-law claimed to need,
directed the preparation, who checked the "rough draft"
he transcript, and who offered it to the trial court
filing, etc.

(3) What marvelous kind of Alice-in-Wonderland double-
is that which is found in the first paragraph on page
f Respondent's Brief? In the first place, it is not
llant's contention, as respondent too nicely and con-
ently claims, that the court refused to let him "offer"
records into evidence, once they were in court, but that
court went far further and refused to order the produc-
of these records and thus kept their contents from it-
and this Court on appeal. And how, in the name of
on, may records be produced unless, when they are other-

unavailable, their production is ordered by the court? These hospital records and arrest reports (and police) were highly relevant to the issue of fraud and cor- ion in the case. This is so obvious that appellant is tled by respondent's claim to the contrary.

After the record had been settled and "approved" by trial court, the California Supreme Court subsequently, ppellant's motion, ordered the prosecutor's opening ess and the voir dire examination of prospective jurors d to the record before it. Fraser was engaged in pre- ng this portion of the record between July, 1950 and ary, 1951. In his petition, among other times, appel- alleged Fraser had been arrested for drunkenness on ber 21, 1950 (R. 11), which was while Fraser was sup- ily actually engaged in preparing the record.

Appellant should have been allowed to question Fraser, uce records and establish this fact. Appellant, as , should have been allowed to call Mrs. Eva Hoffman stablish that Fraser was excessively intoxicated while as attempting to transcribe the notes, was arrested than once during this period, etc. (R. 162).

Appellant, further, by the production of these records by the questioning of Fraser, as well as by corroborat- testimonial evidence, should have been allowed to e Fraser had misrepresented his ability and was in mentally and physically incompetent to transcribe

notes, as alleged (R. 10), because of his excessive of and long-standing and continued addiction to alco-ic beverages, with its inevitable brain damage, which minated in 1953 in an attempt at suicide, hallucinations, ere delirium tremens, and lengthy hospitalization (see 150, 162-163, items 4 & 5).

C. THE DISTRICT COURT DENIED APPELLANT ADEQUATE TIME AND OPPORTUNITY TO PREPARE.

(App. Op. Br. pp. 31-35)

(Resp. Br., Point III-C, pp. 20-22)

Appellant's Opening Brief and the uncontradicted s of record present a decisive answer to respondent's claim that "The court was most liberal in granting to the petitioner in which to prepare for trial." In the first place, time without opportunity to pre- is meaningless (Adams v. U.S. ex rel. McCann, 317 U.S. 279), and the record shows without contradiction that conditions under which appellant was obliged to pre- and consult with counsel at San Quentin were prohibi-. Such conditions were made the subject of affidavits red in support of various motions for relief, and are of the record. Not one counter-affidavit was filed. xplain this failure on his part, respondent offers the se that "Most of these [pre-hearing] proceedings were without notice and due to the shortness of time counter-

idavits were unable to be prepared."

There are four answers which conclusively repudiate s claim: (1) In each case respondent's counsel, being ved copies of all papers filed, were notified of, eared at and participated actively in the proceedings. a single pre-trial hearing was held in the absence respondent's counsel. (2) Respondent's counsel did once request a delay of any pre-trial hearing or ask time in which to file counter-affidavits. (3) The ord discloses that respondent did have ample time to e any counter-affidavits he desired. In one instance econd motion for a transfer of custody was put over a k (R. 85). (4) When respondent testified at his own uest (PTR. 149-176), he did not deny in any substantial ticular the facts alleged in the affidavits; on the trary, his stated purpose in testifying was to justify condemned actions, orders and treatment of appellant, to seek a change of custody for appellant (see respond- 's motion at conclusion of his testimony: R. 176).

Respondent does not and cannot dispute that, at the son prior to the hearings, all of appellant's legal ers were examined and their contents ascertained, or that ellant's person and effects were searched daily, often than once, or that conversations between appellant his counsel were listened to, or that all the other egations relating to this matter were not correct.

Further, since respondent was never personally
sent during consultations between appellant, appel-
t's counsel and others, or when appellant was searched,
testimony was hearsay. Had he wanted to rebut appel-
t's affidavits, he was free to produce as witnesses
agents the guards but chose not to do so.

The District Court's offer to transfer appellant to
atraz may have been "unprecedented" but had appellant
epted it blindly he would have found himself in an
ossible position. Respondent elects to ignore the
idavit of George Davis, appellant's counsel, showing
s to be true. Further, appellant did accept the offer
only asked that the conditions offered be spelled out,
ch the court refused to do. (See R. 123-124, 125, 128-
, 130-131, 132-139.)

Appellant did--and still does--want an early, fair
decisive hearing on these charges. When his counsel
ted this on November 30, 1955, he naturally assumed
would be able to produce witnesses or take their deposi-
ns, have access to relevant public records, and have a
sonable opportunity to prepare. This didn't prove to
he conditions that obtained, however.

After noting that the petition originally was filed
December, 1954, respondent observes that the petition
tains a statement that "said persons [i.e., witnesses
support of the charges] have stated that they are willing

testify to facts germane to this matter under oath suant to subpoena." This is true but it certainly does aid respondent, since it affirmatively appears under division A of this point that appellant was never able subpoena these witnesses, to take their depositions, get vital records produced.

D. THE DISTRICT COURT POSSESSED THE STATUTORY AUTHORITY TO ORDER THE SHORTHAND NOTES PHOTOSTATED AND FURNISHED APPELLANT WITHOUT PREPAYMENT OF COSTS; ITS REFUSAL TO DO SO HAMPERED APPELLANT IN PROVING HIS CHARGES.

(App. Op. Br. pp. 46-27)

(Resp. Br., Point III-D, pp. 22-23)

Respondent's claim that 28 USC § 2250 was intended apply only to records and documents "of the trial court re the trial court was a federal court" is fantasy, fact. It applies to precisely what it says it applies: records and documents on file in the office of any Clerk the United States.

The shorthand notes were on file with the District rt Clerk. They were a crucial part of the record both the State courts and in the District Court, and were red as exhibits at the first opportunity when the rings, which centered around them, began.

The notes were impounded on December 16. The hearings then scheduled to begin on January 9. Appellant's rt, as soon as they were available, immediately began

study them. They were available only at the clerk's ce and when that office was open, which gave appel- 's expert only some 15 days in which to work. Appel- had only a limited amount of funds. If he had paid $300 to $400 required to have the notes photostated ould have been unable to pay his expert. As it was, funds were soon exhausted and he was compelled to eed in forma pauperis.

Too, appellant was running out of time. His expert not able to complete his study of the notes, around h the entire proceeding centered, unless they were lable at nights and on weekends (see PTR. 262-263). llant in consequence immediately asked to have the s photostated and furnished him without cost under SC § 2250.

The District Court had unquestionable power under section to order the notes photostated and furnished llant without charge to him. It prejudicially abused discretion in refusing to do so.

V THE DISTRICT COURT HAD BOTH THE POWER AND DUTY TO REFUSE TO ALLOW J. MILLER LEAVY TO APPEAR AS CO-COUNSEL FOR RESPONDENT; IT SHOULD HAVE DONE SO.

(App. Op. Br. pp. 35-38)

(Resp. Br., Point IV, pp. 23-24)

Contrary to respondent's claim, J. Miller Leavy was "the statutorily designated counsel for the warden."

Attorney General of the State was (Calif. Gov't Code, 511). When (under circumstances not applicable here) strict attorney represents, or acts on behalf of, the en of a State prison, it is always the district attorney he county in which the prison is located (see, e.g., f. Pen. Code, §§ 1475, 3701-3702). San Quentin is in n County. J. Miller Leavy is a deputy district attor- of Los Angeles County.

Respondent has not quoted all of Section 12550 of California Government Code. That section further ides:

> " . . . When he [the Attorney General] deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process."

Thus, the section is not authority at all for the m that the Attorney General has the mandatory power r State law to compel a district attorney or his deputy ssist him in representing a respondent warden in a ral court habeas corpus proceeding. Rather, when icable, the section commands the contrary: it is the rney general who must assist the district attorney.

The District Court had the clear power and duty to se to allow J. Miller Leavy to appear (under the facts

he case), and it is no answer to say it was all right him to appear simply because he did not argue his own imony or because his appearance was purportedly "not ssarily a matter of choice with" him. Leavy obviously ed to appear; if he didn't, he was free to have said If he had, the court certainly would not have forced to.

V THE DISTRICT COURT SHOULD HAVE GRANTED APPELLANT'S MOTION TO MAKE THE STATE OF CALIFORNIA A PARTY-RESPONDENT. APPELLANT DID NOT CALL THE PROSECUTOR, THE SUBSTITUTE REPORTER AND THE TRIAL JUDGE AS ADVERSE WITNESSES; HE WAS NOT ALLOWED TO.

(App. Op. Br. pp. 38-40)

(Resp. Br., Point V, pp. 25-26)

Respondent does not deny that both in fact and in the State was and is the real party in interest in habeas corpus proceeding, but argues that to have ted appellant's motion and hence to have made the e's agents, in addition to the respondent, directly erable to the court "would be a violation of the enth Amendment of the United States Constitution." Respondent is mistaken. The case he cites--Elliott endricks, 213 F.2d 922--expressly holds that a habeas us proceeding is not a suit against the State. To joined the State as a respondent, then, would not made it a party to a suit in any accepted legal nition of that word. It simply would have made it a

y to the proceeding, according judicial recognition
ts actual real party in interest status.

When the writ proceeds against the warden he is not
g sued by the petitioner; rather, the petitioner is
lenging the warden's right to detain him and may ask
ore by way of relief than his release from illegal
ody. And while the writ does proceed against the
en (because he is the custodian and has no right to
the petitioner in violation of petitioner's consti-
onal rights), it seldom is the warden who is the State
t alleged to have deprived the petitioner of those
ts in the first place.

Specifically, in this case, if other State agents
d in the petition had not allegedly deprived appellant
is constitutional rights, then appellant could not
proceeded against the warden or maintained that the
en, by detaining appellant for execution, was not
g beyond his authority as a State officer.

Thus respondent's argument is a truly dubious one.
ils down to this: A State's judicial agents and
ies may contrive to obtain and have upheld on appeal
ital conviction in violation of fundamental constitu-
l rights, and then be forever free from proper Federal
intervention simply by having in advance transferred
etitioner to the custody of a prison warden in another
al judicial district and then blandly maintain that

do not have to, and cannot be made to, answer ctly as a party to any Federal court proceeding.

Such tenuous argument is one arising from convenience er than conviction and merits being dismissed as such.

Respondent's concluding assertion that J. Miller y, appellant's prosecutor in the State court, Stanley er, the substitute reporter, and the Hon. Charles W. ke, the trial judge, were called by appellant as adverse esses is just not true, as the record shows, and appel- could not impeach his own witnesses, so the point is in any sense or to any degree hypothetical.

I RESPONDENT'S SEIZURE AND HOLDING OF APPELLANT'S LITERARY PROPERTY AND HIS REFUSAL TO PERMIT APPELLANT TO HONOR THE CONTRACT ENTERED INTO BETWEEN HIMSELF AND HIS COUNSEL WORKED TO PREVENT APPELLANT FROM PROVING HIS CHARGES, DEPRIVED APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO DECLARE APPELLANT'S RIGHTS ON THESE SUBJECTS.

(App. Op. Br. pp. 40-46)

(Resp. Br., Point VII, pp. 28-29)

Respondent's argument in opposition to this point hly has no merit. True, "Neither the [State] Director orrections nor the State of California were parties the habeas corpus action." But neither were nor are y indispensable nor even necessary parties to a con- eation and decision by the District Court of appel-

:'s application for a declaration of his rights under
SC §§ 2201 and 2202, as prayed for (R. 168-169).

It was the respondent warden who had seized appellant's
rary property; he who held and who still holds it in
possession; he who did and does refuse to release it.
wise, it was and is he who refused to permit appellant
onor the contract entered into between appellant and
counsel, George T. Davis. It is, moreover, not the
ons or motives for his acts that are challenged as
iving appellant of his rights under the Fourteenth
dment, but the acts themselves. Hence it is apparent
the only necessary party was and is the respondent.

Further, the California Attorney General, counsel for
ondent, is also, under State law (Calif. Gov't Code,
511), counsel for the State and the Director. When the
ication for declaratory relief was called and denied
he District Court, this counsel stood by and said
ing on the subject of whom he considered proper parties,
ough he had every opportunity to do so. Having failed
ake his objection in the District Court, he may not
it here for the first time on appeal.

There are several conclusive answers to respondent's
m that "This question [of appellant's rights] should
etermined in the State courts."

First. These questions have been adjudicated by the
e's courts, including its highest court, and this fact

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specifically alleged in the application for declara-
relief (R. 202). State remedies are exhausted.
The petition for habeas corpus in the Marin County
rior Court referred to by respondent was filed long
re, not after, these proceedings were had in the
rict Court. It was denied, except that appellant
given the right to send a written assignment of his
erty rights in the manuscript of the unpublished novel
by respondent, and the question of property rights
lf was left undecided. In practical effect, no relief
granted (R. 186-188).

As well, the California Supreme Court later denied
out opinion a petition for habeas corpus, seeking the
relief as was subsequently sought in the application
declaratory relief under 28 USC §§ 2201 and 2202 in
District Court (R. 174-193).

Appellant has no further available remedy in the State
ts. He is civilly dead (Calif. Pen. Code, § 2602),
so is barred from instituting a civil suit in the
ts of California.

Second. But there is no comparable provision for civil
n in Federal law. Appellant is resultantly free to
in whatever relief to which he may be entitled under
ral law and the 14th Amendment in the Federal courts.

Third. What is ultimately in issue here is not alone
estion of State law, or a non-federal determination

the validity of a State prison regulation. It is
ther the acts of respondent in seizing and holding
ellant's literary property and refusing to allow
ellant to honor the contract entered into between him
his counsel operate to deprive appellant of his property
hout due process of law and deny him the effective
istance of counsel, clearly matters within the juris-
tion of the District Court. This was demonstrated in
opening brief.

Fourth. Federal courts have both the clear power and
y to strike down State prison rules which, in their
lication to a State prisoner seeking relief in the
eral courts, operate to deprive the prisoner of due
cess or equal protection of the law. (Ex parte Hull,
U.S. 546.)

Appellant does have an enforceable legal right to
literary property as well as an enforceable legal right
honor the contract with his counsel. The cases cited
respondent are not in point.

While appellant is civilly dead under State law, he
ressly retains the right to "mak[e] and acknowledg[e]
ale or conveyance of property" (Calif. Pen. Code, §
3). Further, in this State, "No conviction of a crime
ks any forfeiture of any property . . ." (Calif. Pen.
e, § 2604). And the Fourteenth Amendment commands that
State shall deprive any citizen of his property without

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istance of counsel.

II THE RECORD SHOWS, AS A MATTER OF LAW, A PERSONAL, CONTINUING AND FIXED BIAS ON THE PART OF JUDGE GOODMAN AGAINST APPELLANT AND IN FAVOR OF THE STATE OF CALIFORNIA.

A. THE AFFIDAVIT OF DISQUALIFICATION WAS SUFFICIENT.

(App. Op. Br. pp. 47-50)

(Resp. Br., Point Vi, pp. 26-28)

Respondent claims that "the district judge correctly
d that the allegations of the affidavit were insuf-
ent to show personal bias and prejudice." But a
ing of the affidavit (R. 101-118) shows that it was
d on far, far more than, as respondent claims, "a
opinion of the judge on a matter of law and an ad-
e prior ruling." It was based on the angry and intem-
te language of Judge Goodman's opinion in Chessman v.
s, 128 F.Supp. 600, on the evident personal hostility
icit therein, on the public hysteria that opinion pro-
d; on the judge's repeated complaints that the case
before him; on his reference to his court as a laundry;
is unkept promises to change appellant's custody; on
refusal to grant appellant adequate time or opportunity
epare and present his case, etc., as set out in the
ng brief, and as fortified by his widely publicized
pts to have the habeas corpus law changed and shut

ellant out of Federal court, his conduct of and com-
ts during the actual hearings, and his statement that
didn't care what the Supreme Court intended, he was
ng to proceed in his own way, etc.

In such a fact setting appellant again submits that
point should be controlled and tested by the stand-
s fixed by the Supreme Court in the cases of In re
chinson, 349 U.S. 133, 136, and Berger v. United States,
U.S. 22.

Appellant has another case, Knapp v. Kinsey, 232 F.2d
, which he believes is squarely in point. There the
th Circuit stated and held (p. 466):

" . . . When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored. (Citations.) . . .

" . . . the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether consciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and fully justifies appellants' complaint that at times 'he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff.' Although appellees' counsel did not ask or need such assistance, and

apparently at times realized the possible prejudice to their case, the prejudicial effect to appellants' rights requires a reversal of the judgment. (Citations.)"

judgment was reversed and the case remanded for re-
l before another judge. The interests of justice
for a like decision in this case.

B. THE AFFIDAVIT OF DISQUALIFICATION WAS TIMELY; ON ITS FILING, JUDGE GOODMAN SHOULD HAVE DISQUALIFIED HIMSELF.

(App. Op. Br. p. 51)

(Resp. Br., Point VI, pp. 26-28)

Respondent argues that appellant's affidavit of dis-
ification was not timely. He cites 28 USC § 144 in
and then points out that the affidavit was not filed
l December 29, 1955, which was 29 days, to quote re-
dent, "after petitioner was expressly informed that
e Goodman would handle the matter and approximately
days [actually 12 days] prior to the time then set
trial [but actually 18 days before the hearings got
rway]."

First. 28 USC § 138 provides that "The times for
ing terms of court shall be determined by rule of the
rict court." And by rule the District Court for this
rict has provided that "Terms of this Court shall be
at San Francisco commencing on the first Monday in
n, the second Monday in July and the first Monday in
ber of each year."

Thus, since the term during which appellant's habeas pus hearing was held began on the first Monday in ember, 1955 and did not end until early March, 1956, since the Supreme Court's mandate did not come down il November 28, 1955 (several days after the term had un), and since hearings were concluded and the decision iered weeks before the term ended, appellant could not sibly have filed his affidavit "not less than ten days ore the beginning of the term at which the proceeding s] to be heard."

In this context, court terms are simply an irrelevant ion, "and the difficulty with fictions is that those are most apt to mislead are those who proclaim them." Justice Jackson in a separate opinion in Brown v. n, 344 U.S. 443, 542.)

Second. Appellant filed his affidavit at the earli- possible and practicable time. True, appellant learned Judge Goodman would be the hearing judge on November 1955--and, through counsel, immediately objected in to the assignment (PTR. 2-6). On this same date, e Goodman flatly rejected counsel for appellant's suggestion he voluntarily disqualify himself and ed he then was not prejudiced (PTR. 7-13, 19-20).

Appellant accepted the refusal and the statement. else could he do? To have filed an affidavit in face of both would have been a futile act. It would,

ther, have foreclosed appellant from seeking Judge
dman's disqualification at some future date should it
ear the judge still entertained the bias appellant
ieved he had shown in the past, since the statute
mits "A party [to] file only one such affidavit as
any judge."

As soon as it became apparent to appellant that
ge Goodman still did entertain a personal, continuing
fixed bias and prejudice against him, and it further
pared that the facts of record were sufficient to
ablish that bias and prejudice as a matter of law,
ellant immediately prepared and filed his affidavit.
t he set out all the relevant facts. Therefore,
pondent's argument that the affidavit was not timely
quibble.

Third. It is not, as respondent claims, "appellant's
ention that [without more] the judge against whom
affidavit of bias or prejudice is filed must permit
her judge to pass on the sufficiency of the affidavit."

It is appellant's contention, as demonstrated under
t VII-A just above and in the opening brief, that the
davit more than sufficiently showed as a matter of
the bias denounced by 28 USC § 144, and hence that,
andatorily required by law in such a situation, Judge
man should have proceeded no further, and another judge
ld have been assigned to hear the proceeding.

As noted, no counter-affidavit was filed; the facts not disputed. Respondent significantly does not agree with appellant's statement in the opening brief t "disqualification, further, would not have interfered n the regular hearing and disposition of the case."

The point is not academic or the prejudice suffered appellant slight by the failure of Judge Goodman to qualify himself. That failure deprived appellant of most fundamental right demanded by our system of sprudence: the right of the litigant to have his e heard by an impartial judge. (In re Murchinson, U.S. 133, 136.)

CONCLUSION

There is nothing to be found in Respondent's Brief t dictates appellant should or must retreat from position that, for those reasons specified and argued his opening brief and here, this Honorable Court uld reverse the order and judgment of the District rt -- discharging the writ and remanding appellant to tody -- with appropriate directions either to dis- rge appellant from custody, or to hold full and fair rings on appellant's charges.

WHEREFORE, this alternative relief, as prayed for pages 52-53 of Appellant's Opening Brief, should be nted.

Dated: July 23, 1956.

Respectfully submitted,

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In Propria Persona

No. 15110.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUCAS HUDSON, SR., and PACIFIC-PALMDALE DEVELOPMENT COMPANY, a corporation,

Appellants,

vs.

WILLIAM A. WYLIE, as Trustee in Bankruptcy of the Estate of JOHN LUCAS HUDSON, SR., a Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal from an order of the District Court, outhern District of California, Central Division, af-rming on review, Findings of Fact, Conclusions of Law nd Order of a Referee in Bankruptcy. Jurisdiction f the District Court existed under Section 67(c), Title , U. S. C. A. Jurisdiction of this Circuit Court of ppeals lies under Section 47(a) and (b) of Title 11, . S. C. A.

Statement of the Case.

This appeal is taken from an order of the District Court in a summary proceedings in favor of William A. Wylie, trustee in bankruptcy of the estate of John Lucas Hudson, Sr., confirming a decision by the Referee holding that the trustee was entitled to certain sums and credits arising on account of personal services of the bankrupt rendered before and after adjudication under a contract alleged by the trustee to have existed prior to adjudication.

In 1952 the bankrupt made an assignment for the benefit of his creditors [R. p. 205]. An attorney, Mr. Granger, had represented the bankrupt in a lawsuit prior to his assignment, but did not represent him therein nor again until early in 1954 [R. pp. 232-233]. Attorney Granger, desiring to exploit the bankrupt's talents for mass production in construction, obtained his oral statement that his personal services would be available to Mr. Granger in any deal he might later set up [R. p. 233]. Prior to March, 1954, Mr. Granger, in the name of Sierra Construction Company, submitted to Commodity Credit Corporation (hereinafter referred to as CCC) a request for the right to bid on a contract for the fabrication and erection of grain bins. The request was not answered for several months. While the bankrupt was employed for wages as a construction foreman in San Diego Mr. Granger conceived the idea of a program for the mass production of homes, and developing the idea investigated the various areas where an active demand for homes would encourage FHA and VA government loans and determined upon Palmdale, California, as a likely area [R. p. 235]. About January, 1954, Mr.

Granger, in company with the bankrupt, one Philip Bloom, and another unidentified man, visited Palmdale and located a piece of property suitable for immediate subdivision belonging to one Thornburg [R. pp. 273-275]. Mr. Bloom was a building contractor with offices in Culver City, California. In March, 1954, Mr. Bloom, Mr. Granger and Blanche V. Hudson, wife of the bankrupt, signed and acknowledged Articles of Incorporation of Appellant corporation, Pacific-Palmdale Development Company (hereinafter referred to as PPD Co). The articles had not yet been filed with the Secretary of State when Mr. Granger received from CCC an invitation to bid for a contract to construct grain bins. Mr. Granger at once conferred with the bankrupt and while the latter was in the office of Liff & Kim, architects, in reference to the housing deal at Palmdale, Mr. Hudson learned of one Lloyd R. Reeve as a prospect to finance the grain bin deal. This was about April 3, 1954 [R. pp. 71, 72]. There followed negotiations which speedily resulted in the preparation of a joint venture agreement whereby the Reeve interests would finance and manage the grain bin deal and PPD Co. would make available to Reeve interests the personal services of the bankrupt for one-half the profit [Tr. Ex. 1]. The agreement was prepared by Mr. Granger representing PPD Co. and Mr. Minton, as attorney for the Reeve interests, on April , 1954 [R. p. 166]. The agreement was finished late the day and at once flown by Mr. Reeve to Washington, D. C. [R. pp. 328-329] where the bankrupt was waiting him. Articles of PPD Co. were filed in Sacramento on the day of the night Mr. Reeve flew to Washington and a certified copy was not yet available the directors in Santa Monica and Culver City, hence

at the time Mr. Reeve left for Washington, there was no authority set up to sign the agreement nor was it signed by any agent of PPD Co. [R. pp. 328-329]. Mr. Hudson telephoned Mr. Granger and stated that Mr. Reeve desired the agreement executed before a bid was submitted to CCC [R. pp. 331-332]. When there appeared the necessity for executing the agreement at once at Washington, D. C., Mr. Granger commissioned the bankrupt to sign it for PPD Co., with his agency then to end [R. pp. 328-329]. As soon as was reasonably possible this action was approved and adopted into PPD Co. corporate records as shown by Respondents' Exhibit G [R. p. 247].

About April 9, 1954, the bid was filed with CCC following 3 days work at Washington, D. C., by Mr. Reeve and the bankrupt [R. pp. 91-92]. On April 17, 1954, CCC conditionally accepted the bid [R. p. 93]. On April 19, 1954 (date of filing of the petition in bankruptcy herein and adjudication) Reeve, Inc., accepted the conditions of the earlier CCC acceptance, but then had yet to put up a performance bond which was not posted until after April 28, 1954 [R. p. 225]. On April 20, 1954, PPD Co. adopted a resolution to employ the bankrupt on the grain bin deal for a compensation of the first $50,000.00 of its profit and 50% of all other profit after PPD Co. had received a similar amount [R. p. 250 and Resp. Ex. D]. The bankrupt accepted a written memorandum of the terms of the employment on May 3, 1954, after returning from Sacramento to aid Mr.

Reeve in posting the bond. The joint venture earned a profit of which $20,000.00 was paid to PPD Co. and by it to the bankrupt. More is yet to be paid at the close of litigation between the joint venturers.

The District Court held PPD Co. to be the *alter ego* of the bankrupt and a means to defraud the estate of profits from the grain bin deal. It held the bankrupt indebted unto his estate for all profit he received from the grain bin deal and substituted the trustee in place of PPD Co. in a state court action against the Reeve interests for an accounting. The bankrupt and PPD Co. prosecute this appeal.

Specifications of Error.

The Court erred in each of the following respects:

1. Finding of Fact VII [R. pp. 18-20] is not supported by the evidence.

2. Finding of Fact XXIV [R. pp. 24-25] is not supported by and is contrary to the evidence.

3. Finding of Fact XXV [R. pp. 25-26] is contrary to and not supported by the evidence.

4. Finding of Fact XLV [R. p. 31] is contrary to and not supported by the evidence.

5. Finding of Fact XLVI [R. p. 32] is contrary to and not supported by the evidence.

6. Finding of Fact XLVII [R. p. 32] is not supported by the evidence.

7. Finding of Fact XLVIII [R. pp. 32-33] is not supported by and is contrary to the evidence.

8. The Findings of Fact fail to find on any of the facts established by the evidence, which are as follows:

(a) When he filed his Petition in Bankruptcy the bankrupt and his wife and children resided together in California.

(b) The bankrupt's wife never joined in nor consented to any assignment by him of his future earnings.

(c) All sums paid to the bankrupt or to PPD Co. under the joint venture agreement were paid only in consideration of the personal services performed by the bankrupt.

(d) The fund from which any sums were paid, in the grain bin deal, unto appellants did not come into existence until after April 19, 1954.

(e) Services of the bankrupt on the grain bin deal and compensation for same were not reasonably divisible into those proportions of the whole performed or earned before and after April 19, 1954.

(f) The services performed by the bankrupt on the grain bin deal were performed both before and after April 19, 1954, a substantial portion of the whole being required to be performed after April 19, 1954, in order to earn any compensation under the joint venture agreement and employment contract.

9. Each of the Conclusions of Law except V and XII are against the law and the evidence.

10. The Court erred in approving and affirming the Referee's decision of December 6, 1955.

Summary of Argument.

Appellants believe their argument sustains all the foregoing specifications of error and tends generally to establish the following conclusions as determinative of the appeal.

1. The Appellate Court is not bound by the trial Court's Findings of Fact.

2. Employment of the bankrupt and the fund from which his services were to be paid did not exist actually or potentially on April 19, 1954.

3. Wages may not be assigned when they are to be earned under a contract which is merely possible at the time of the assignment.

4. No inquiry can be made into the question of corporate *alter ego* if no fraud or inequitable position is being shielded thereby.

5. There can be no actionable fraud without damage and creditors cannot be defrauded of that to which they are not entitled.

6. Earnings of the bankrupt in the grain bin deal were subject to his contract as his property and did not belong to his trustee in bankruptcy.

7. PPD Co. was not the corporate *alter ego* of the bankrupt.

8. Assuming PPD Co. to be the corporate *alter ego* of the bankrupt, yet the trustee and creditors are not entitled to the bankrupt's earnings and no fraud was intended or committed or inequitable position created.

ARGUMENT.

I.

The Appellate Court Is Not Bound by the Trial Court's Findings of Fact.

A. When there is no conflict in the evidence on material issues, an appellate tribunal is in as good position as the trial court to draw inferences from the evidence and is not bound by the trial court's findings.

See:

In re Jersey Materials Co., 50 Fed. Supp. 428, 53 Am. Bk. Rep. N. S. 359;

In re Hedgeside Distillery, 123 Fed. Supp. 933 942 (I);

Stewart v. Ganey, 116 F. 2d 1010, 1013;

Sheldon v. Waters, 168 F. 2d 483.

There is no conflict in the evidence which established these determinative facts:

1. PPD Co. articles of incorporation were signed March 9, 1954 [Resp. Ex. I].

2. Said articles of incorporation were forwarded to Sacramento by Mr. Granger on April 3, 1954, and filed with the Secretary of State on April 6 [R. p. 239].

3. When said articles were signed and acknowledged the original invitation from CCC to bid on the grain bin deal had not been received [R. pp. 234-235].

4. Negotiations with Mr. Reeve for financing the grain bin deal did not start until April 2 or 3, 1954 [R. p. 71].

5. The joint venture agreement between PPD Co. and Reeve was formulated April 6, 1954, and executed April 7, 1954 [R. p. 78].

6. Philip Bloom had no interest in the grain bin deal at any time [R. p. 290], but his interest in and activity with PPD Co. continued many months until as late as April 25, 1954 [R. pp. 294, 297 and Resp. Ex. J].

7. The night of the very day said articles were filed at Sacramento, Mr. Reeve flew the unexecuted joint venture agreement back to Washington, D. C., and desired that it be executed before any bid was submitted to CCC. Thereupon, by telephone call, Mr. Granger authorized the bankrupt to sign the agreement for PPD Co., limiting his authority to that act and the return of the contract to PPD Co. [Resp. Ex. G, R. pp. 328-329].

8. PPD Co. as a party was discussed prior to drafting the joint venture agreement [R. 76]. In early April Mr. Bloom was interested in getting into the grain bin deal [R. pp. 290, 291].

9. Mr. Granger's only legal opinion to the bankrupt regarding his financial affairs was to tell the bankrupt that if he planned to save from substantial earnings the funds with which to re-establish himself in business, he should know that such savings were subject to the demands of his creditors unless they released him or he obtained a discharge in bankruptcy [R. p. 267].

10. Mr. Granger had represented Mr. Hudson in two law suits [R. pp. 232-233] and did not represent him in the assignment for creditors.

11. Mr. Granger initiated and developed the grain bin deal and the Palmdale construction deal on his own

initiative for the purpose of capitalizing on the bankrupt's talent for mass construction production [R. pp. 233-237].

12. The bankrupt performed 4 days work at Washington, D. C., prior to his bankruptcy adjudication on April 19, 1954, in procuring a CCC contract for the joint venture [R. pp. 104-105].

13. The bankrupt performed substantial service in performance of the CCC contract for bins and such service continued for more than one year following the filing of his bankruptcy petition and adjudication. Such work was necessary to the creation of the fund from which the joint venture was to derive its profit [Tr. Ex. 1; R. p. 94].

14. Neither the joint venture agreement nor the employment agreement between PPD Co. and the bankrupt divides either the bankrupt's services or compensation for his services into proportions of the whole which were performed or earned before and after his adjudication.

15. The employment agreement between PPD Co. and the bankrupt was made after his adjudication [Resp. Ex. D].

16. At the time of his adjudication, the bankrupt lived in California with his wife and children [R. pp. 196, 203].

17. The bankrupt's wife never consented to any assignment of his earnings [R. p. 206].

18. Though the Reeve bid for a grain bin contract was accepted on April 19, 1954 (date of adjudication), Reeve did not deposit his performance bond with CCC until after April 28, 1954 [R. pp. 5, 6, 107, 225].

B. Current Findings of Fact by the Referee and District Judge will not be accepted on appeal when a mistake has been clearly shown.

See:

In re Ernst, 107 F. 2d 760;
In re Hoffman, 82 F. 2d 58, 60;
Kauffman & Brown etc. v. Long, 182 F. 2d 594 (9th Cir.).

When such a mistake is shown, the appellate court's review may be as extensive as that of the District Judge.

See:

Morris Plan etc. v. Henderson, 131 F. 2d 975.

As will be shown later in this argument, the learned Referee gave no recognition whatever to rules of law which should be controlling and mistakenly emphasized an issue as paramount which would have been no issue at all had such rules of law been acknowledged.

II.

Employment of the Bankrupt and the Fund From Which His Services Were To Be Paid Did Not Exist Actually or Potentially on April 19, 1954.

A. Employment of the bankrupt, though contemplated, did not actually exist until at least April 20, 1954, when PPD Co. adopted its resolution employing the bankrupt, though he did not accept formally until May 3, 1954, when he returned to Los Angeles from Sacramento, because of Reeve's difficulty in obtaining a performance bond [Resp. Ex. D].

B. The joint venture agreement [Tr. Ex. 1] was executed April 7, 1954 [R. p. 78]. By its very terms it was

limited to the 1954 bin program of CCC and had Mr. Reeve not been awarded a CCC contract the joint venture agreement would have had no subject matter upon which to operate. Hence, until the CCC contract was awarded Mr. Reeve for 1954 the condition upon which he could utilize the bankrupt's services could not arise, except to prepare and submit a bid, and under such circumstances there was no possibility of such services ever being compensated. It appears that the terms of such agreement were determined on April 19, 1954, between CCC and Mr. Reeve by the latter's telegram accepting CCC's earlier conditional acceptance of the original Reeve bid [R. p. 15]. However, Mr. Reeve had yet to deposit a performance bond with CCC. It was not deposited until after April 28, 1954 [R. p. 225]. The simple result of this was that no contract existed between CCC and Reeve until the bond was deposited.

See:

Restatement of Law of Contracts, p. 45, Sec. 38(a), and p. 66, Sec. 60; also

Flynn v. Dougherty, 3 Cal. Unrep. 412, 26 Pac. 831, 832.

The deposit of a performance bond, though subsequent in form, is precedent in effect and no contract existed between CCC and Reeve until it was deposited.

See:

Williston on Contracts, Rev. Ed., Vol. 3, p. 1917, Sec. 667-A.

If on the date the bankrupt filed his petition and was adjudicated, there was only the possibility that he might engage in future work, certainly those services would have to be performed and their compensation earned after adjudication and the earnings would belong to the bankrupt. Under such circumstances the bankrupt's position is similar to that of a man who is hired by the month and files for bankruptcy and is adjudicated in mid-month. The law gives such a man his salary earned after the filing and adjudication, as will be seen under Point VI of this argument.

III.

Wages May Not Be Assigned When They Are To Be Earned Under a Contract Which Is Merely Possible at the Time of the Assignment.

The Reeve contract with CCC did not exist on April 19, 1954, and on that day was a mere possibility because Reeve's performance bond was not filed until after April 28, 1954. The mere possibility of wages is not subject to assignment and the filing of the petition in bankruptcy could not imply assignment of earnings under a merely possible contract, such wages not even having a potentiality until 10 days after the filing.

See:

Walker v. Rich, 79 Cal. App. 139, 249 Pac. 56.

IV.

No Inquiry Can Be Made Into the Question of Corporate Alter Ego if No Fraud or Inequitable Position Is Being Shielded Thereby.

The learned Referee was under the impression that the question of whether PPD Co. was the corporate *alter ego* of the bankrupt was the paramount issue in the case and expressly declared this opinion [R. p. 90]. From the premise of that opinion, the Referee advanced to the conclusion that if it were his *alter ego,* "it is one and indivisible, it does not make any difference whether he did or did not perform or devote himself to the joint enterprise." Such reasoning appears entirely fallacious and gives no recognition whatever to the rule that the propriety of a corporate *alter ego* cannot be questioned except to avoid a fraud or inequitable advantage which arises from the double relationship. It is common and essentially honest practice for a man to channel his personal efforts through the medium of a corporation. It is not sound to argue that a man using a corporate *alter ego* is, *ergo,* guilty of fraud because it is not enough to show that the corporation is the mere instrumentality of the individual.

See:

12 Cal. Jur. 2d, p. 604, Art. 8, and cases cited.

It must appear that to recognize separate entities would aid the consummation of a wrong.

See:

Minific v. Rowley, 187 Cal. 481, approved in *Wenbau v. Hewlett,* 193 Cal. 675, 697;

Jackson v. American Bearing, 89 Cal. App. 2d 256, 200 P. 2d 836;

Marr v. Postal Union Life Ins. Co., 40 Cal. App. 2d 673, 105 P. 2d 649.

It was necessary to determine that a fraud or inequitable advantage was created and being protected by the corporate structure before inquiry could be made into the question of the propriety of the corporate *alter ego.* This the learned Referee did not do. He regarded that question as of first importance and held that its creation was fraudulent, a finding wholly without support in the evidence as will be seen under Point VII of this argument. The Referee should have first determined whether a fraud had been committed and then made inquiry into the question of corporate *alter ego* after fraud was discovered.

See:

Chiarello v. Axelson, 25 Cal. App. 2d 157, 70 P. 2d 731;

Stanford Hotel Co. v. Sewind, 180 Cal. 348, 181 Pac. 780;

Erkenbrecker v. Grant, 187 Cal. 7, 200 Pac. 641;

Walter Co. v. Zuckerman, 214 Cal. 418, 6 P. 2d 251.

For the moment, let us reason, in part, as the Referee as reasoned, and hold that PPD Co. was the *alter ego*

of the bankrupt. This would first result in a determination that the joint venture agreement was really between Mr. Reeve and the bankrupt with the effect that, at the time of his adjudication, the bankrupt had an employment contract with Mr. Reeve under which he had done 4 days work in procurement of a CCC contract. Such CCC contract was but a potential because Mr. Reeve had yet to deposit his performance bond which he did more than 10 days after the adjudication. By the posting of the bond, and not until then, did there come into existence a subject matter for the parties to work on under their joint venture agreement, and from which pay for the services might come. As will be seen under Point VI of this argument, such pay for the services was the property of the bankrupt and not that of his estate or trustee. There is no fraud to date. Now assume that the bankrupt sees fit to divide his earnings with his wife, his son and his attorney. Still no fraud is committed, nor intended. If he seeks to effect that division through the medium of a corporation, there is still no fraud. The learned Referee reaches the fraud only by mistakenly giving prime importance to the question of corporate *alter ego* as the Referee himself declares. The close relationship between the bankrupt and PPD Co. the Referee deemed of a fraudulent character and because of it ruled that all earnings of the bankrupt for more than one year after his adjudication were the property of his bankrupt estate. An appellate court has somewhat aptly characterized a decision of such nature

as subjecting the bankrupt to an "involuntary servitude" for his creditors. The Referee, once sparked on the question of fraud, found fraud throughout transactions where there was no suggestion of fraud.

The bankruptcy act is a benevolent statute. It contemplates that an honest debtor may, under its influence, rehabilitate himself financially. It is impossible for such debtor to file under the act without in some measure contemplating his own rehabilitation and in some detail planning for personal and profitable activity after his adjudication. If such planning ripens into an asset prior to his filing, that asset belongs to his creditors, unless exempt, but if the planning and even some effort does not become an asset, neither the creditors, the trustee nor the Referee should seek to accelerate a mere potential into an assumed reality and thus prevent the rehabilitation the Act would afford. Surely a beneficent statute does not lose its beneficence merely because one planning his enjoyment of it finds that his plans have not borne fruit at the time he claims its benefits. It would seem that a bankrupt's plans for the future belong but to him, so long as he surrenders his existing assets to his creditors.

When the learned Referee emphasized the question of corporate *alter ego* as of first importance in the case he was under a mistaken concept of the law, and this is one reason why, as contended under I-B of this argument, the Appellate Court is not bound by the Findings of Fact.

V.

There Can Be No Actionable Fraud Without Damage and Creditors Cannot Be Defrauded of That to Which They Are Not Entitled.

As will appear later in this argument, the earnings of the bankrupt under the grain bin deal belonged to him. In that they were his property they could not constitute a part of his bankrupt estate. To exclude from such estate that to which the creditors are not entitled is not a wrong to the estate or to the creditors. While the bankrupt intended no fraud upon his creditors, even had he intended such by an association with PPD Co., yet the creditors sustain no damage in being deprived of that to which they are not entitled. To be actionable, a fraud must be accompanied with damage.

See:

Gonsalves v. Hodgson, 38 Cal. 2d 91, 237 P. 2d 656;

Gerini v. Pac. Employ. Ins. Co., 27 Cal. App. 2d 52, 55(3), 80 P. 2d 499;

Tsang v. Kan, 78 Cal. App. 2d 275, 177 P. 2d 630;

United States v. North Pac. Ry. Co., 188 F. 2d 277;

Ward v. Deavers, 203 F. 2d 72;

Dabney v. Levy, 191 F. 2d 201.

There being no damage or actionable fraud, the question of corporate *alter ego* was wholly immaterial.

VI.

The Earnings of the Bankrupt in the Grain Bin Deal Were Subject to His Contract as His Property and Did Not Belong to His Trustee in Bankruptcy.

A. As seen under Point III of this argument, at the time of his adjudication the bankrupt's prospect of activity under the joint venture agreement was but a possibility, until there existed a contract between CCC and Reeve and the performance bond had been deposited. Also, PPD Co. had no reason yet for defining its agreement with the bankrupt and did not do so until its offer of the next day which the bankrupt accepted on May 3, 1954. Future earnings under a contract which is non-existent are non-assignable.

See:

Orkow v. Orkow, 133 Cal. App. 50;
Cox v. Hughes, 10 Cal. App. 553;
Williston on Contracts, Vol. 2, pp. 1183-1184.

B. On April 19, 1954, the bankrupt was a married man residing with his wife in the State of California [R. pp. 196, 203]. His wife did not consent in writing to any assignment of his future earnings [R. p. 206].

Section 300 of the California Labor Code provides that the assignment of future wages of a married man is not valid unless consented to in writing by his wife. This section of the Labor Code receives a very liberal interpretation by the Courts and the terms "wages," "fees," "salary" and "compensation" are synonymous.

In *Reynolds v. Reynolds,* 14 Cal. App. 2d 481, 58 P. 2d 660, the Court said:

> "Be that as it may, a fee is compensation and compensation is salary."

Quoting from *Kirkwood v. Soto,* 87 Cal. 394, the Court further said:

> "The words 'compensation' and 'salary' were evidently used synonymously in the Constitution and the County Government Act. . . . 'Wages' and 'salary' as here employed are comprehensive terms and must be interpreted in their broader sense to mean compensation for services, whether such compensation is limited to a fixed sum of money or is payable in fees."

In *United States v. Gerdel,* 103 Fed. Supp. 635, 638, it is stated:

> "California decisions hold that the modern statutory usage of the word 'salary' is intended to embrace all forms of compensation."

C. This point in the argument impresses appellants as involving the most determinative of the various phases of this case. Let us state the rule of law for which appellants contend: If, under an existing and continuing contract, a bankrupt performs a service prior to his filing a petition in bankruptcy, and also under that contract must and does perform substantial service after such filing and his adjudication in order to make any compensation whatever payable, and the services and their compensation are not reasonably divisible into the proportions of the whole of either which were performed or earned before and after the filing and adjudication, the

entire of such compensation belongs to the bankrupt and none to his trustee.

This very Circuit Court (Ninth Circuit) has approved and adopted the rule in *Miller v. Wooley,* 141 F. 2d 837, 839, by citing and following the rule which was so clearly announced at some length in the case *In re Leibowitt,* 93 F. 2d 333, 115 A. L. R. 623, from the Third Circuit and in which the United States Supreme Court denied a writ of certiorari. In the cited case the bankrupt was an insurance agent who had a continuing contract with the insurance company. Prior to his adjudication he had written policies and had yet to perform substantial services on those policies before a salary and commissions accruing after adjudication became payable. Reference was made by the Court to Bankruptcy Act 47(a) and 70(a-5), as amended, and 11 U. S. C. A. 75, 110, and it held that the bankrupt was entitled to sums earned prior to adjudication in that they were not severable from earnings for services after adjudication.

In re Seiffert, 18 F. 2d 444, involved circumstances which are in many respects similar to those in the case at bar. The contract was a continuing one, existing long before bankruptcy, under which some work had been done before bankruptcy and more work yet to be done after adjudication in order to create the fund from which any compensation was to become payable (if the bankrupt did not elect to take a monthly salary of $40.00 as he had the right to do—an option which did not exist in the case at bar). On November 1, 1923, the bankrupt had made an agreement to manage a farm for two years and at his option could receive $40.00 per month or ⅔ of the grain and seed crops produced,

his option to be exercised not later than 10 days after threshing time. He filed his bankruptcy petition on April 10, 1924, and was adjudicated 2 days later. He did not schedule the contract. In the fall of 1924, 5,500 bushels of wheat were harvested and he elected to take his percentage of the grain. It was held that the contract had not been performed at the time of filing the petition and adjudication and no recovery could have been made upon it and charges against the bankrupt were not sustained.

The rule was recognized in the 7th Circuit in the case of *In re Thomas,* 204 F. 2d 788. The bankrupt was adjudicated July 31, 1936. It was claimed that he concealed fees earned as a State court trustee but not yet paid when he filed his petition. On August 18, 1939, he was allowed $3,500.00 fee by the State court. This fee covered almost one year prior to adjudication and three years subsequent thereto. The Referee found that portion of the fee earned prior to bankruptcy passed to the trustee. The appellate court held that as there was no way to determine what was due when the petition was filed, the Referee's division was speculative and uncertain and therefore erroneous.

The rule was announced from the 2nd Circuit in *Lockhart v. Mittleman,* 123 F. 2d 703. The bankrupt filed his petition September 1, 1939, and was at once adjudicated. Since 1935 he had acted as a State court trustee. The trustees usually filed their account every six months and the bankrupt had always been granted an allowance of $8,000.00 on an account for such period. The allowance for the term ending June 30, 1938, had been made and paid prior to September 1, 1939. On May 4, 1939, several months before the filing of the

bankruptcy petition, the trustees filed their account for the period ending December 31, 1938, but no allowance was made thereon until September 5, 1939, 4 days after the filing of the bankruptcy petition. The Referee held the sum transferable and that it should have been scheduled but on appeal the court said: "The dividing line is whether the compensation has been so far 'earned' that the officer's (bankrupt's) conduct thereafter is not a factor in determining the amount." It was held that the asset was not required to be scheduled. In the case at bar, Mr. Hudson's services after his adjudication were required to earn and produce the fund from which he was to be paid and were also necessary to determine the amount of his pay.

In re Coleman, 87 F. 2d 753, involved the bankruptcy of an attorney. He had been engaged under a contingency fee arrangement to prosecute a suit for damages which he filed before filing his petition in bankruptcy. It was held that his fees did not pass to the bankruptcy trustee as the bankrupt had no rights until his services were performed and a fund existed. In the case at bar, Mr. Hudson could receive no pay for "procurement" of the CCC contract (his services rendered prior to his bankruptcy and adjudication) because under the CCC contract no money would be owing until "performance." He was adjudicated April 19, 1954, the performance bond with CCC was not deposited until after April 28, 1954, and all "performance" was after his adjudication. The joint venture had no rights until after performance and no fund for compensation existed until after such performance.

In *Mersfelder v. Peters Cartridge,* 130 Ohio C. C. N. S. 220, it was held that an incomplete contract for

personal services afforded no asset for the bankruptcy estate of the person who was to perform them.

The foregoing citations declare for the principle that an honest bankrupt shall not be required to labor throughout the future in a sort of involuntary servitude for his creditors, yet that is exactly what the District Court decision would require of Mr. Hudson.

Counsel for the trustee are learned in the law and skilled in the procedure of the bankruptcy practice in which they have, for over 25 years, specialized with a probably more intensive activity than any law firm in California. In preparation of the petition which initiated this proceeding [R. pp. 3-9] they must have had a ready familiarity with the rule of law above set forth. They also knew the facts, including the year of service which the bankrupt gave to performance of the contract AFTER his adjudication. As astute lawyers, they knew, too, the difficulty to be experienced in recovering under the petition they were to prepare. Therefore, they declared expressly upon an ORAL contract between Reeve and the bankrupt involving merely PROCUREMENT of a CCC contract [R. p. 3, par. II], though, not to weaken their case, they also declared upon the written agreement [R. p. 4, par. V, and Tr. Ex. 1]. They declared upon "procurement" separately because they knew that all effort at procurement had been completed prior to adjudication.

The evidence failed wholly to establish the oral contract. The trustee's only witness on the matter, Mr. Reeve, testified that it was not intended to operate under an oral joint venture agreement and that it was intended that their activities were to be covered by a written contract [R. pp. 141-142; Tr. Ex. 1].

Under the rule set out in Section 1625, Civil Code of California, all oral preliminary negotiations are deemed merged into the later writing. Trustee's counsel eventually abandoned the theory of trying to establish a separate oral contract of the bankrupt to cover only the "procurement" nature of his service [R. pp. 124-127].

The rule of law first set out in this division of appellants' argument is the premise for much of their defense in this action because the joint venture agreement and the bankrupt's employment contract were continuing contracts, his services, personally performed, were their subject matter and necessary to the creation of a fund which did not then exist but from which payment for services must be made, the fund coming into existence and the large part of the services being performed after his adjudication. Such documents did not contemplate any determinable division of the services or their compensation into any proportions of the whole of each which were to be performed or earned before and after the adjudication date.

The trustee's learned counsel gave clear evidence of agreeing with appellants upon this rule of law for which they contend and, more importantly, its application to the facts of this case. Firstly: the trustee sought to have witness Reeve divide the bankrupt's services in "procurement" and "performance" into their percentages of the entire service [R. pp. 84-90]. Trustee's counsel knew how important and vital it was to his case to make this division when he said: "It is highly relevant to the determination by the Court as to what percentage was procurement" [R. p. 85]. Then again, on the page of the record last above cited, trustee's counsel further stated: "At least, that portion of the contract that was fully

performed and the amount due for procurement of the contracts was an asset of this estate." Secondly: on the same page of the record, the application of the rule to this case is admitted by the trustee when his counsel states: "As to performance after this contract, this estate has no interest."

It is unmistakable that the trustee, at this point of the record has declared his position to be that "procurement" was a service rendered prior to bankruptcy and that all compensation for such procurement belonged to the estate, and that the estate was *not entitled to any more* (italics by appellants). Also, at this point in the record it is unmistakable that the trustee claims the compensation for the services were divisible and that a portion of the whole could be assigned by the Referee to the service of mere "procurement." It is as equally unmistakable that the appellants were contending that a division of the whole compensation could not be made. The differences between the parties at this stage of the record could be summed up as follows: The trustee contends for divisibility of service and compensation, *rejecting* all of each which might be allocated to the period *after* adjudication, and the appellants contending no suggested division could be made.

It is interesting to note that the Referee's decision rejected the claims of both sides and held that *all* compensation for *all* service, without any division and without recognition of time of performance, belonged to the trustee. In reaching his conclusion, the learned Referee labored under a mistaken concept of the law which appellants have heretofore assigned as another reason why this Circuit Court is not bound by the findings of fact.

The trial record is notably wanting in any authorities cited by either party in support of their contentions on this issue. At the close of the case, when trustee's counsel arose to deliver the opening argument which would normally include and be followed by the authorities upon which the parties relied, the Referee waived aside the argument and proceeded with his statement of his decision. Had such authorities been acceptable, they might have served to acquaint the learned Referee with the rule of law which the parties acknowledged, but which, as will appear from the following excerpts of the record, was not clear in the thought of the learned Referee.

At a time when the parties' counsel were contending over the question of percentages of the service, the Referee stated: "the paramount issue here is whether or not in fact this corporation Palmdale Pacific Development Company, was not in fact the *alter ego* of the bankrupt. In other words, if the corporation was his *alter ego* and it is one and indivisible, *it does not make any difference whether he did or did not perform or devote himself to the joint enterprise* [italics added; R. p. 90]. Witness Reeve testified he could not make the division counsel sought [R. p. 94]. Later in the record, trustee's counsel again sought to adduce evidence of the divisibility of the services [R. pp. 123-124]. He made a further explanation, seeking to show the importance of dividing the Hudson effort into percentages given for procurement, when the learned Referee, wholly mistaking the object of counsel's effort, and confusing the attempted division with a possible comparison of time spent by Reeve and Hudson, stated: "Now what difference does it make how much percentage of each man was devoted to procurement and how much to production? The Court does

not understand what you are getting at . . ." [R. p. 126]. Earlier, after trustee's counsel had rather fully and carefully explained the object and aim of his questioning, the learned Referee stated: "The Court is a little uncertain by what you mean by your explanation in view of the testimony of this witness that he and Mr. Hudson and others journeyed to Washington, stayed at the Statler Hotel there and used their joint endeavors to procure the contract" [R. p. 125]. Appellants respectfully urge that the learned Referee's own words establish his mistaken concept of the law when, after a clear statement by trustee's counsel of what he intended to prove by asking Mr. Reeve the question: "Mr. Reeve, in the services to be performed by Mr. Hudson as furnished to Lloyd R. Reeve, Inc., under this contract of April 7, 1954, to the best of your ability, can you estimate what portion of the services of Mr. Hudson were performed in procuring contracts and what percentage of the services were performed in the performance of the contracts after procurement?" [R. p. 124] the Referee inquired: "Now what are you trying to prove by your last question?" [R. p. 125].

Not perceiving the real issue of the cause as it occurred to and was presented by counsel for both parties, but emphasizing that the primary issue was that of the corporate *alter ego* he thought he saw in PPD Co., the learned Referee proceeded to a decision which made no division whatever of either the bankrupt's services or the compensation for them and awarded the entire compensation to the trustee, though only four days of time prior to adjudication had been spent in "procurement" and over one year after adjudication was spent in "performance" which made that compensation possible.

VII.

PPD Co. Was Not the Corporate Alter Ego of the Bankrupt.

In Finding of Fact VII the learned Referee holds that on April 3, 1954, when Articles of Incorporation of PPD Co. were filed in the office of the Secretary of State of California, it did not contemplate the transaction of any business save and except the joint venture deal between the bankrupt and Reeve, Inc., relating to the grain bin deal. Such is not a fair inference from the evidence and yet must have been of prime consideration in the Referee's finding of fraud.

As between inferences equally reasonable and equally susceptible of being drawn from proven facts, it is the duty of the trial court or jury to draw that inference which is favorable to fair dealing.

See:

Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753;

United States v. California Midway Oil Co., 259 Fed. 343.

Let us consider some of the proven facts from which the Referee had to draw the inference in Finding of Fact VII which we have above referred to.

The grain bin deal was discussed for the first time by Hudson and Reeve on April 3, 1954 [R. p. 71]. Negotiations had not ripened into a deal as late as April 5, 1954 [R. p. 75]. In such negotiations, Mr. Reeve had been told that Mr. Bloom was a part of PPD Co. [R. p. 77] but that there was a plan to take Mr. Bloom out of PPD Co. because of his interest in building at Palmdale. Mr. Bloom testified he was in dozens of meetings with

reference to the Palmdale building program [R. p. 273] and a corporate structure was desired in connection with it [R. p. 274] and Mr. Bloom was in favor of PPD Co as such corporation [R. p. 285]. His activity in affairs planned for the corporation had commenced as early as January, 1954 [R. p. 275] and continued until at least April 25, 1954. In the early references to a grain bin deal, at a time not definitely determined, Mr. Bloom was interested to get into the grain bin deal [R. p. 291], but what form of organization might finally define his interests was not clear to him because of the "fluid" nature of developments which somewhat depended on the attitude of Mr. Thornburg who owned the land and might finance the deal at Palmdale [R. pp. 282, 283, 296]. As Mr Bloom enthused about the Palmdale deal, he lost interest in the grain bin deal and finally divorced himself from it [R. p. 291].

From these proven facts Mr. Bloom's interest must be accepted (a) as being so substantial as to preclude a finding that PPD Co. was originated as a corporate *alter ego* of the bankrupt and (b) as existing prior to the signing of the corporation's articles in March, 1954. In view of the period during which the independent Bloom interest existed, the Referee could not fairly infer that on April 3, 1954, PPD Co. contemplated no business but the grain bin deal as stated in Finding of Fact VII.

In this connection, appellants would discuss the fact that the joint venture agreement allowed the possible assignment of it to Mr. Hudson. From this the Referee must have inferred fraud [Finding of Fact XIX, R. p. 23]. Such provision, when understood, is entirely consistent with the innocence of the bankrupt and his attor

ıey of any fraud. The grain bin deal developed with ·are rapidity. Within 3 or 4 days after the bankrupt and Mr. Reeve first talked of it, they were in Washington, D. C., preparing a bid to CCC, the joint venture agreenent having been drawn and executed. Contributing to his speed of unfoldment, Mr. Granger met with Mr. Minton and drew the joint venture agreement on April 5, 1954, when Mr. Granger did not know positively that PPD Co. was a corporation. However, as he had cleared he corporate name with the State at an earlier date [R. pp. 253, 254] and the articles were in conventional form ıe expected there would be no delay and that on that day PPD Co. existed as a corporation though he would not ıave had a report on it as yet from Sacramento. Deiding, somewhat upon the spur of the moment, to use hat corporate charter on the grain bin deal, Mr. Granger vas faced with the fact that Mr. Bloom *might* have no ıterest in the grain bin deal, though all Mr. Bloom's rior activity on the Palmdale deal might develop into a ıbstantial building program for PPD Co. in which Mr. loom *would* have a substantial interest. It seemed proper ıat a provision should be put in the joint venture agreeıent which would allow for the divorcement of the Bloom ıterest in Palmdale construction from the grain bin deal which he might have no interest. Without knowing hat the future held as to time and terms of such diorcement, Mr. Granger hastily provided the assignment ause as a vehicle for divorcement. It was never used Mr. Bloom withdrew to set up his interest in a Thornırg corporation [R. pp. 283, 296].

It is not sound to reason that when as late as April 5, 1954, Mr. Bloom decided to channel his interest in the lmdale deal otherwise than through PPD Co. and

withdrew from such corporation, thereupon PPD Co. became the *alter ego* of the bankrupt with the retroactive effect of having been conceived in fraud. Surely a corporate structure, fairly evolved, cannot be deemed fraudulent from the start merely because one man, for fair business reasons that evolved slowly, retired from such corporation.

Proof of actual fraud is necessary to establish a transfer to hinder, delay and defraud creditors.

See:

Faulkner v. Magri, 90 F. 2d 808, 810.

VIII.

Assuming PPD Co. To Be the Corporate Alter Ego of the Bankrupt, Yet the Trustee and Creditors Are Not Entitled to the Bankrupt's Earnings and No Fraud Was Intended or Committed or Inequitable Position Created.

The conduct of the bankrupt or his attorney was not that of a man who was about to commit or in the course of perpetrating a fraud. They willingly testified to all facts with reference to planning and organizing PPD Co. After filing the petition in bankruptcy, they so informed Mr. Reeve [R. p. 116]. Mr. Granger's advice to Mr. Hudson about getting a release from his creditors or a discharge in bankruptcy was perfectly natural and proper advice under the circumstances. Mr. Bloom fully understood that Mr. Granger had initiated both the Palmdale and grain bin deals for his own business gain [R. pp. 273, 274, 278, 294]. There was never any attempt to conceal the fact that Mr. Hudson was to receive a compensation for his services from PPD Co. Indeed, the record in this case shows about $100,000 total profit

rom the grain bin deal by the joint venture [R. p. 95]. One-half of this profit, which would be less than $50,000 was to be paid unto PPD Co. which, without any deductions for any salaries for its officers or other purpose, was obliged to pay the full receipts up to $50,000 to the bankrupt. Any real effort at fraud would have involved an effort to appropriate otherwise than expressly to the bankrupt the *first* substantial funds which might otherwise have gone directly to the bankrupt. The profit up to the full amount of this $50,000 was as much subject to the demands of Hudson's creditors in the hands of PPD Co. as it would have been in the hands of Reeve had Hudson dealt directly with Reeve and there were no PPD Co. Even under the fanciful theory of corporate *alter ego,* the first $50,000 was at all times vulnerable to creditors' attack as fully as if it had been owing by Reeve to Hudson, so, again we have no damage to creditors in relation to the profit made and it is idle to look for fraud up to that point.

Again, that Mr. Hudson executed the joint venture agreement at Washington, D. C., on behalf of the corporation is not a badge of fraud. Mr. Reeve wanted a joint venture contract before the CCC bid was filed, because he wanted the Hudson experience in bin building available to him before he contracted for a job on which Mr. Reeve himself was inexperienced. The contract had been flown to Washington, D. C., before corporate papers had been returned from Sacramento to Santa Monica, and before its agents had a chance to sign it. Hudson's only authority was to sign the agreement and return it to PPD Co. Such mechanics were reasonable under the circumstances presented by the speed of the deal. The substantial sum of $50,000 was avail-

able to Hudson creditors before PPD Co. was to get a thing for its own officers and owners. Surely this was fair dealing as far as those creditors are concerned. Prior to bankruptcy Mr. Hudson had made an assignment for the benefit of his creditors in which his creditors were so well informed that (a) not one saw fit to examine him on a $500,000 loss at the first meeting of his creditors [R. p. 347] and (b) not one filed any specification in opposition to his discharge.

It is respectfully urged that the bankrupt was free of fraud and also free to contract with reference to future personal earnings and because of these facts and a complete absence of any inequitable treatment of creditors, the creditors and the trustee have no right to any compensation for the bankrupt's services incident to the grain bin deal.

Respectfully submitted,

MERRILL L. GRANGER,

Attorney for Appellants.

No. 15,131

IN THE

United States Court of Appeals

For the Ninth Circuit

ATES STEAMSHIP COMPANY, a corporation	*Appellant,*
vs.	
NITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
ATLANTIC MUTUAL INSURANCE COMPANY,	*Appellant,*
vs.	
TATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
ACIFIC NATIONAL FIRE INSURANCE COMPANY,	*Appellant,*
vs.	
TATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
NITED STATES OF AMERICA,	*Appellant,*
vs.	
TATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
HE DOMINION OF CANADA,	*Appellant,*
vs.	
TATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLANT UNITED STATES OF AMERICA.

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TATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLANT UNITED STATES OF AMERICA.[1]

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[1]Appellant United States shall hereafter be referred to as the Government", the States Steamship Company as "Petitioner" d all other appellants and appellees as "other claimants" in view the large number of appellants and appellees herein. References pages of the record will be prefaced by a capital "R" followed the page number.

JURISDICTION.

Jurisdiction of the District Court in this Admiralty Cause rests upon Rules 51 to 55 of the United States Supreme Court Admiralty Rules,[2] by reason of a petition (R.3) filed by States Steamship Company, a corporation, appellant and appellee herein, for exoneration from or limitation of liability from all claims (Government, R.11, and other claims, R.25, R.43, R.61) arising out of the sinking of the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, on January 9, 1952, four days after her departure from Seattle, Washington, in the Gulf of Alaska. The radiograms from the PENNSYLVANIA describe her imminent sinking by reason of a crack down the port side between Frames 93 and 94 starting in the sheer strake and running down 14-feet, allowing sea water to enter the engine room through the crack and also sustaining a failure or breakdown of the steering system and being for a time unable to steer by any method in heavy seas, the taking of water in the No. 1 hold and the deck cargo coming adrift, taking off the tarpaulins on the forward hatches and the No. 2 hatch being open and full of water, the vessel down by the head, resulting in the sinking and total loss of the vessel, all of her crew, all personnel, and all cargo aboard. By its findings of facts and conclusions of law (R.72) and its interlocutory decree (R.78) Petitioner States Steamship Company, was by the lower Court denied exoneration from liability for failure to use due dili

[2]See *Morrison v. District Court of Southern District of New York*, 147 U.S. 14, 37 L.ed. 60 (1893).

gence to make the vessel seaworthy (R.78) and granted limitation of liability to the value of the freight pending at the time of the vessel's loss.

The Petitioner and all cargo claimants [the death claims having been compromised, settled and dismissed (R.73, R.93)] have appealed from parts of the interlocutory decree, the Petitioner appealing from that part of the interlocutory decree denying exoneration from liability and the cargo claimants appealing from that part of the interlocutory decree granting limitation of liability to the amount of the freight pending, so that all the parties to the action are both appellants and appellees before this Court.

This Court's jurisdiction of the Appeal of the Government rests upon 28 U.S.C. 1292(3) by reason of the Notice of Appeal (R.83) filed February 23, 1956, from all that part of the interlocutory decree (R.78) dated February 10, 1956 and entered on February 16, 1956, which orders, adjudges and decrees that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA be allowed or granted and from every part of said interlocutory decree which orders, adjudges and decrees that the petition of said States Steamship Company for limitation of liability is allowed or granted.

STATEMENT OF THE CASE.

The District Court, having filed its Memorandum opinion (R.71), called for a hearing on the settlement of Findings of Fact and Conclusions of Law at which

hearing the District Court refused to adhere to its Memorandum Opinion (R. 71) [See the *Kiska-Mayflower,* (9th Cir.), 205 F. 2d 262, 1953 A.M.C. 1021], and after full argument of all counsel of all the parties, the District Court entered the following (R.72):

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.[3]

"The above-entitled cause coming on for trial commencing on the 13th day of July, 1954, upon the petition of States Steamship Company, under the provisions of Sections 183 et seq. of Title 46, United States Code, for exoneration from or limitation of liability from all claims arising out of the sinking of the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, on January 9, 1952, with the total loss of the vessel, all of her crew and personnel aboard and all of her cargo, and it appearing to the Court that prior to the time of trial default had been duly entered of all persons having claims arising out of said disaster except those who had filed claims herein, and it further appearing that all claims for death of the crew and personnel aboard on file here had been settled out of court, the trial proceeded upon the sole remaining issues presented by the petition and the claims for loss of cargo, * * *[4] and evidence both oral and documentary having been introduced, and the petition and all claims in this cause remaining for decision being sub-

[3]Reported 1956 A.M.C., page 1810.

[4]The portions left out as indicated by * * * relate only to the appearances of the parties and their attorneys.

mitted, the Court now, after due deliberation thereon and consideration of extensive arguments and briefs of counsel, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

That petitioner, States Steamship Company, in February 1951, purchased from the United States of America the SS PENNSYLVANIA, formerly the LUXEMBOURG VICTORY, a Victory-type vessel, Official Number 245,327, built for the Government by the Oregon Shipyard and completed on April 5, 1944, with dimensions of 455 feet, 3-11/32 inches in length, with beam of 62.1 feet, and gross tonnage of 7,608 tons.

II.

That on January 5, 1952, the petitioner, as the owner and operator of the SS PENNSYLVANIA, sailed said vessel (designated as Voyage VI), from the Port of Seattle for the Port of Yokohama via the Great Circle Route, as a common carrier for hire, having on board the cargo of the claimants which the vessel had received in good order and condition, and that during the course of said voyage the SS PENNSYLVANIA sank during a storm in the Gulf of Alaska at a position of approximately 505 miles WNW of Seattle, Washington, and 535 miles SE of Kodiak, Alaska, with a total loss of the vessel, all of her crew and personnel and the total loss of all her cargo, including all the cargo of the claimants.

III.

The storm, which has been designated as Pennsylvania storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle Route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness.

IV.

The contributory factors responsible for the sinking of the SS PENNSYLVANIA are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water.

V.

That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.

VI.

That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability.

VII.

That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the petition and the claims of cargo interests under Rules 51 to 55 of the United States Supreme Court Admiralty Rules.

II.

That the petitioner has failed to prove due diligence to make the SS PENNSYLVANIA seaworthy at the inception of the voyage upon which she sank by reason of her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants.

III.

That the petitioner has proved that the unseaworthiness of the SS PENNSYLVANIA at the inception of her voyage was without the knowledge or privity of the petitioner and is entitled to limited liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954.

IV.

That the cargo interests are entitled to judgment against the petitioner for the amount of the pending freight in ratio to the amount of their respective claims, with interest at 6% together with their costs.

Let an interlocutory decree enter accordingly and if the parties cannot agree between themselves as to the damages and segregation thereof, the matter shall be referred to a commissioner to be appointed by the Court who shall ascertain the amount thereof and

nake report to the Court in accord with the agreement of the parties made at the commencement of the trial."

The Court having, by its Findings of Facts and Conclusions of Law, found that the vessel was unseaworthy at the inception of its voyage, that the petitioner did not use due diligence required by law to make the vessel seaworthy so as to entitle it to exoneration from liability, and that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner, entered its interlocutory decree (R.78) in which it was decreed that the petition for exoneration from liability be denied and that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA on January 9, 1955, the date of her sinking and the end of her voyage, be granted.

STATUTE.

The pertinent provisions of the statute involved on this appeal are as follows:

The Limitation of Liability Act,

Sec. 183 of Title 46, U.S.C., provides as follows:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in

the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

SPECIFICATIONS OF ERRORS RELIED UPON BY APPELLANT UNITED STATES OF AMERICA.

The appellant United States of America relies upon the following specifications of error which it intends to urge on appeal herein:

Specification I.

The District Court erred in finding and holding as a matter of fact and concluding as a matter of law, that the petition for limitation of liability to the amount of the pending freight on the SS PENNSYLVANIA at the end of her voyage be granted and allowed (Statement of Points, I and V), and in failing to find and conclude that the Government was entitled to recover the full value of its cargo and to enter judgment in its favor therefor. (Statement of Point X).

Specification II.

The District Court erred in finding, holding and concluding that the evidence is sufficient to show that the unseaworthy condition of the PENNSYLVANIA at the inception of her voyage was without the privity and knowledge of the petitioner and in failing to find that the said condition was within the privity and knowledge of petitioner. (Statement of Points, II, III, IV and V).

Specification III.

The District Court erred in failing to find and conclude that the petitioner had failed to sustain the burden of proving that the cause of the sinking of the PENNSYLVANIA and the resultant loss of the Government's cargo was without the privity and knowledge of the petitioner. (Statement of Point IX).

Specification IV.

The District Court erred in failing to find that petitioner had failed to prove that the unseaworthiness of the PENNSYLVANIA, including her many faults, defects and crack-sensitiveness, were not within the privity and knowledge of petitioner through its Marine Superintendent Lester A. Vallet, and in failing to find that petitioner had fully delegated the duty to make said vessel seaworthy to its said Marine Superintendent who had knowledge and privity of its unseaworthy condition at the commencement of its voyage. (Statement of Points, VI and VII).

Specification V.

The District Court erred in failing to find and conclude that the petitioner, in sailing the PENNSYLVANIA via the Great Circle Route, knew of its unseaworthiness, including the crack-sensitiveness of the vessel to the cold waters of the Gulf of Alaska where the vessel sank, and in failing to find and conclude that the petitioner knew that the PENNSYLVANIA was not fit to meet the perils expected on her fatal voyage. (Statement of Point VIII).

STATEMENT OF FACTS.

The lower Court found (Finding III, R. 75) that "the sole and proximate cause of the sinking of the PENNSYLVANIA" on January 9, 1952, with the loss of her entire crew and cargo was her own unseaworthiness at the inception of the final voyage (Finding V, R. 76, Designated Voyage VI) and that the contributory factors of this unseaworthiness (Finding IV, R. 75) were that the vessel sustained a crack between Frames 93 and 94 running down about 14 feet, sea water entering the engine room through this crack, the failure or breakdown of its steering system, the vessel for a time being completely unable to steer by any method in heavy seas then existing, the taking of water in the No. 1 hold, the cargo adrift on the forward deck, taking off tarpaulins on the forward hatches and the No. 2 hatch being open and full of water. The many "faults, failures, breakdowns and defects set forth in the preceding Finding IV, together with the crack-sensitiveness of the vessel to extreme cold weather, by reason of a former 22 foot crack in her deck occurring on her previous Voyage V which crack was fully repaired were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately causing her sinking." (Finding V. R. 75, 76).

Many of the "faults, failures, breakdowns and defects" which were the immediate causes of this, one of the greatest marine disasters in the Pacific, are

graphically set forth in the dying words of the Captain of the ship sent just prior to the time the vessel sank as relayed by the wireless messages, directly, and indirectly through other ships, to the Coast Guard. These messages point the accusing finger against Petitioner and its Marine Superintendent Vallet, of high negligence, privity and fault which sentenced the ship, Master and crew to their cold and icy grave in the Gulf of Alaska, which prevents the Petitioner from limiting its liability herein as it did in *The IOWA,* (D. Ore.), 34 F. Supp. 843, 1938 A.M.C. 615, in which latter case there was no evidence from the ship showing the unseaworthy causes of sinking. These messages, all dated January 9, 1952, were introduced in evidence as Exhibits 127 and 128, the pertinent portions of which are as follows:

"FROM SS PENNSYLVANIA
TO (CCGD THIRTEEN)
JAN 9 1952 0643
1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL DECK HALFWAY DOWN ENGINE ROOM PORT SIDE WIND WNW 9 VERY HIGH WESTERLY SEA VESSELS IN VICINITY PSE QRX AND QSL DE KWCT AR' "

'FROM SS PENNSYLVANIA
TO (CCGD THIRTEEN)
JAN 9 1952 0729
1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST HULL CRACKED 14 FEET

DOWN PORT SIDE INTO ENGINE ROOM VESSEL TAKING WATER BUT CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE VESSELS IN VICINITY PSE KEEP CLOSE WATCH BT DE KWCT' "

"FROM SS PENNSYLVANIA

TO (CCGD THIRTEEN)

JAN 9 1952 1007

'091730ZGMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM' "

"FROM SS PENNSYLVANIA

SEATTLE RADIO/KLB VIA MACKAY

63 JANUARY 9 1130AM 1952

STATESLINE PORTLANDORG

'1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CANNOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM. IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE. VERY HIGH SEAS. CAN NOT GET ON DECK AT PRESENT. DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES. CAN NOT GET ON DECK TO SECURE

MASTER' "

"FROM COGARD RADST PT HIGGINS
TO CCGD THIRTEEN
JAN 9 1952 1213
'FOLLOWING RECD ON 500KCS QUOTE SOS SOS SOS DE KWCT KWCT KWCT BT SS PENNSYLVANIA AT 1920 LAT 51.09 N 141.13 W RPT 51.09 N 141.13 W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD DOWN BY HEAD REQUIRE AID AR DE KWCT HW UNQUOTE' "

"FROM OS NAN TO COMWESTAREA COGARD

FROM COMWESTAREA COGARD
TO CCGD THIRTEEN
JAN 9 1952 1341
'FOLLOWING RECEIVED ON 500 KCS at 1956Z QUOTE KWCT DE KTOG POSN 49.10N 142.35W HAVE HIGH SEAS DID YOU GET ASSISTANCE YET AND WHAT YOU NEED/NOT YET BUT HOLD ON PUMPING ALL OIL FM— WEATHER STILL PRETTY — UNQUOTE AT 2015Z SUGAR OBOE SUGAR DE KWCT BT PENNSYLVANIA 1920 GMT PSN 51.09N 141.13W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD TARPS FWD HATCHES STILL HOLDING USING HAND STEERING NEED ASSISTANCE AR DE KWCT UNQUOTE — KWCT DE NMJ R R SUGAR OBOE SUGAR AR UNQUOTE AT 2021Z QUOTE FM SS CYGNET IS OUR ASSISTANCE NEEDED PLEASE GIVE PLENTY TIME DUE TO SEAS WE ESTIMATE 24 HOURS FROM YOUR POSN PLEASE ADVISE BT MAS-

TER AT 2024 UNKNOWN STATION SENDING VVV DE NMC QRT — BT K' "

As there were no survivors, and not even a lifeboat or any wreckage sighted, the radiograms from the vessel are the only direct evidence of what the vessel, her valiant master and crew, were going through and the causes of her sinking. The evidence clearly supports the Court's finding that the PENNSYLVANIA storm "was not of such magnitude as to constitute a peril of the sea, the weather encountered if not actually anticipated certainly was of a kind reasonably to have been expected on Trans-Pacific voyages on the Great Circle route" and that "the sole and proximate cause of the sinking of the PENNSYLVANIA" four days after her departure from Seattle, Washington, was "her own unseaworthiness". *The SOUTHERN SWORD,* (3rd Cir.) 190 F.2d 394, 1951 AMC 1518; *The PLOW CITY,* (3rd Cir.) 122 F.2d 816, 1941 AMC 1564, cert. denied 315 U.S. 798.

The past history of the PENNSYLVANIA warned of and clearly indicated to Petitioners Marine Superintendent Lester A. Vallet the faults and defects of the vessel ultimately causing her loss. The admitted facts as well as the testimony of the witnesses show that petitioner through its Marine Superintendent, who was the alter ego of the petitioner in charge of manning and operating the vessels and making all inspections and repairs (R.2624), had full reports of the history and physical condition of the PENNSYLVANIA (ex-LUXEMBOURG VICTORY) from the time she was launched until the commencement of her

fatal Voyage No. VI from the Port of Seattle on January 5, 1952. This history shows that the vessel was built in April 1944, and on her first voyage in that year ran on a reef in the Fiji Islands while empty with no ballast and while traveling at a speed of 13 or 14 knots (R. 2221), the vessel sustained considerable bottom damage in this incident, which was subsequently surveyed and repaired at San Francisco (Exhibit 147). Between 1944 and January 1951, while the vessel was owned by the Government, she sustained numerous incidents of severe and extensive damage to her hull and frames due to heavy weather, collisions, etc., including a 3-foot fracture on the forecastle head in 1947 (R.2361). Some of these repairs were made by fairing the old material in place, some were made by complete replacement of damaged plates and others were made by partial replacement of damaged plates (Exhibit 147 and R. 2390 through 2430, 2438 through 2455, 2583 through 2585.) In a report of May 6, 1948, it was noted that the bottom plating of the vessel from No. 2 to No. 5 double bottoms was wavy with deepest distortions ¾″ and average distortion ¼″ (Exhibit 147). Nothing was ever done to repair or counteract this wavy bottom condition (R. 2401). In January 1949, a small amount of hogging in the vessel's bottom was noted by an American Bureau of Shipping surveyor (Exhibit 147). In December 1950 and January 1951, representatives of the Petitioner made an examination and survey of the ship with a view to purchasing the vessel from the Government (R. 140 through 147) and by Bill of Sale effective February 17, 1951, the vessel was sold by the Government to the States

Steamship Company *without warranty* (Exhibit 3), the petitioner giving to the Government a preferred mortgage to secure an indebtedness of $754,000.00 (R. 249) on the purchase price of approximately $1,000,000.00. At the time of sale in February, 1951, cracks under padeyes in the deck plating in the vicinity of Nos. 2, 3, 4 and 5 hatches indicating heavy stresses upon the deck were repaired to make the vessel seaworthy. (R.638, 445). These stresses are explained by Mr. Hechtman (R.2368, 2369-2371).

Immediately after purchasing the vessel, States Steamship Company had certain alterations carried out, including conversion of the deep fuel oil tanks in No. 4 cargo hold, over objections by the Maritime Commissions as mortgagee of the vessel. The Commission warned by letter of February 7, 1951 (R. 252): "Elimination of these trunks would definitely jeopardize the vessel in case of damage in the way of these tanks when carrying dry cargo or empty where large permanent lists should be incurred with possible eventual loss of the vessel." Marine Superintendent Vallet did not agree with Maritime on the ground that "we met all the requirements of the Coast Guard and the American Bureau of Shipping. They did not require it." This alteration included the cutting of hatch openings in the deep tanks approximately 16 feet long and 8 to 10 feet wide (R. 436). Prior to its fatal voyage, the ship, while owned by States Steamship Company made five voyages across the Pacific and back. On the 6th, 7th and 8th of August, 1951, annual inspection was had but the main steering engines were only tested

by operation from the wheelhouse and observed from the engine room, and they were not opened up for inspection, Mr. Vallet being present in charge during the whole annual inspection (R. 170), and no evidence was introduced showing any inspection of any padeyes for fractures and they were not in fact inspected.

On October 27, 1951, the SS PENNSYLVANIA sailed, for the commencement of its Voyage V, from Long Beach, California, bound for the Orient (Exhibit 69). On November 2, 1951, while proceeding in heavy weather with a fairly high temperature of 54°, the vessel sustained a 22-foot crack, designated as a Class 1 casualty, in the main deck on the starboard side just forward of the midship house (Exhibit 44). On being advised of this crack by radio, the States Steamship Company *"suggested"* to the Master by radio that he return to the closest and safest port and the Master then proceeded into Portland, Oregon (R. 161), which is the head office of the States Steamship Company, so far as operations go, (R. 292). Mr. Lester Vallet, the Marine Superintendent, attended aboard the vessel on arrival, and surveyed the damage and prepared specifications for the repairs (R. 163). The 22-foot crack was also inspected by the American Bureau of Shipping and the Coast Guard and the repairs were carried out by the Albina Engine & Machine Works (R. 162). The vessel was not drydocked at this time and only so much of the cargo was unloaded from the No. 3 'tween deck and from the deck of the vessel around No. 3 hatch as was necessary to inspect and repair the 22-foot deck crack and other damages in that immediate

area (R. 235 and 281). Even with the history of the three foot crack on the forecastle head occurring in 1947 (R. 2361, ABS Report 1099), and cracks around padeyes in vicinity of Nos. 2, 3 (R. 617, 638), 4 and 5 (R. 445) hatches found and noted in Coast Guard Reports in February, 1951, which were required to be repaired before the vessel could be declared seaworthy (R. 645, 648), no tests of or inspection of padeyes on the deck portions of the vessel other than those in the immediate area of this 22-foot crack, a Class 1 Casualty, were made by the Petitioner at this or any other time, although it was known that cargo would be secured to such other padeyes, and heavy trucks, trailers and the acid crib were thereafter actually lashed to padeyes on the deck on the fateful Voyage VI (R. 1028, 1064, 1084). The American Bureau of Shipping surveyor confined his examination to the immediate area of the 22-foot crack (R. 912). A survey was also made by a Mr. Kenneth Webb on behalf of Lloyd's. His examination also was confined to the immediate area of the crack, although he would have examined the interior of all the holds of the vessel for other damage if the vessel had been unloaded (R. 1127 and 1128). Mr. Vallet, Petitioners alter ego, in drawing the specifications for the repairs, did not inspect padeyes on other parts of the ship although he knew of previous cracks therein.

The 22-foot deck fracture in the vessel was classified as a Class 1 casualty by the Ship Structure Committee (Exhibit 189). It was determined that the 22-foot crack started at a padeye location on the starboard

side of the deck of the vessel (R. 167). A study and examination of a sample of this deck steel by the Bureau of Standards revealed that the major crack spread from a small crack at the padeye in the deck which was older and had existed in the deck for a considerable period of time as evidenced by the scaly rust (Exhibit 136 and R. 1885 and R. 1886).

At the time the vessel cracked on Voyage V, the air temperature was 54° (Exhibit 44) which is considered a high temperature for a fracture to occur (R. 2773). It gave both positive and constructive notice and warning to the petitioner, through its Marine Superintendent, Mr. Vallet, that this vessel "was notch sensitive which means that if a notch or abrupt discontinuity is present in the steel and the steel is below its critical temperature, it will fracture beginning in the area of the notch, with the application of far less energy than would normally be required." The *ESSO MANHATTAN* (S.D. N.Y.) 121 F. Supp. 770, 1953 A.M.C. 1152. Mr. Vallet was familiar with the Reports of the Ship Structure Committee under date of June 15, 1946 so pointedly referred to in the *ESSO MANHATTAN supra* and should have heeded the warning of the crack sensitiveness of the SS PENNSYLVANIA given by the previous fractures around padeyes near the 2, 3, 4 and 5 hatches and the 22-foot crack, and the previous 3-foot crack on the forecastle head. There was no survey or inspection made of any of the padeyes on the deck of the vessel at the time of inspection of this No. 1 Casualty other than the 22-foot crack except the one padeye on the port side which Mr. Vallet, the Marine

Superintendent, discovered and had removed because a crack had started therein. (R. 167)

While the vessel was in Portland for these repairs on Voyage V, it was discovered by a crew member of the vessel that the emergency steering gear was not working properly (R. 344). The ensuing investigation by Marine Superintendent Vallet indicated that cargo in the No. 5 hold in the nature of Army blankets and clothes had entered in around the shaft and wrapped around it so as to make it difficult to turn. The shaft was freed up by removing this clothing (R. 169 and 217) but no measures were taken to prevent a recurrence (R. 372) of trouble with the emergency steering gear, although this same hold No. 5 was loaded full of cargo on the fateful Voyage VI. What, if any, tests were made of the hand steering gear which operates the telemotor by hand was not shown although the radiograms and findings of the Court show that "for a time the vessel was completely unable to steer".

The vessel sailed from Portland on November 14, 1951, and continued its Voyage V to the Orient and returned to Seattle, Washington. During the return voyage from the Orient the fourth assistant engineer of the vessel detected a 2-foot crack in an angle bar where the bulwark fastened to the midship house on the port side at the after end of the house (R. 2663). This crack was never repaired and petitioner has not accounted for its failure to do so.

The vessel went on drydock at Todd's Shipyard in Seattle on December 21, 1951, at 1912 hours (Exhibit 44). The Marine Superintendent and Port Engineer

of the company, Mr. Vallet, did not go to Seattle for this drydocking (R. 178), but sent his assistant port engineer, Mr. Brenneke (R. 331). Since Mr. Brenneke was fully empowered to take Mr. Vallet's place and perform his duties in Mr. Vallet's absence (R. 241), Mr. Brenneke had the full authority of Lester Vallet, the Marine Superintendent, in the premises (R. 2623, 2624) and thus had charge of this part of the petitioner's business during the drydocking period. The knowledge and privity of Mr. Brenneke was the knowledge and privity of petitioner. Mr. Brenneke's examination and survey of the vessel was limited to the underwater portions of the vessel (R. 1718 and 1719) even though advised by Mr. Vallet to make a thorough examination (R. 271 and 272). The vessel had carried cargo back from the Orient to Seattle on the return trip of Voyage V (R. 2102) and since the vessel was discharging cargo on December 23, 1951 (R. 1161 and Exhibit 44) the day after the vessel came off the drydock, it is clear that the vessel still had cargo aboard her while she was on drydock.

While the vessel was on drydock, examination and surveys of the underwater body were conducted by the Coast Guard and the American Bureau of Shipping. Neither the Coast Guard representatives (R. 685) nor the American Bureau of Shipping surveyor (R. 769) received any special information or reports of anything unusual about the vessel including the 22-foot crack on Voyage V, either before or during their drydock examination, nor did they make any inspection on deck of the padeyes or below deck for cracks, nor

was there any evidence of inspection of any of the steering engines which failed to operate just before the vessel sank. In fact there was no full examination of either the main or hand steering gear by opening them up at any time. The vessel came off drydock at 1650 hours on 22 December 1951. Some general cargo was discharged and some steel plates were shifted in the vessel on 23 December 1951 (R. 1161 and 1162 and Exhibit 44). On December 27, 1951, the vessel arrived at Vancouver, British Columbia (R. 962). The lower holds of the vessel were prepared for the receipt of bulk grain and these preparations included sealing off of the bilge strainers in the lower holds with two layers of burlap (See deposition of the Grain Foreman, Neil McIver, Exhibit 186, R. 2637-2640, R. 2654). After completing the loading of the grain cargo the vessel departed from Vancouver on January 2, 1952, and proceeded back to Seattle, Washington (Exhibit 44).

The vessel arrived at Seattle on January 2, 1952, and docked at the Pier 37 to load Army cargo (R. 1165). At some time prior to the vessel's arrival at Seattle, the States Steamship Company had tendered certain space on the PENNSYLVANIA to the Army for carriage of their cargo on that voyage (R. 2775). The space offered by the States Steamship Company included the entire deck space of the vessel (R. 2130). On the basis of the space offered and cargo which the Army had available, the Army had made up a pre-stowage plan (R. 2118). The Army pre-stowage plan indicated that the label corrosive acid was to be stowed

on deck in the wings of No. 5 hatch, extending up about one-third of No. 4 hatch and that the five gallon carboys should be stowed one level high and that red label acetylene should be stowed under deck (R. 2120, 2121 and 2128).

The Government cargo was loaded aboard the PENNSYLVANIA between January 2 and January 4, 1952, by an independent contractor (R. 1068). Under the terms of the contract between the States Steamship Company and the Government, all loading and stowage was under the supervision of the Master (Exhibit 133, Article 5(g)). During the course of the loading of the vessel, the Master intervened and designated specifically that the corrosive acid should be stowed on the forward deck alongside No. 2 hatch rather than on the after deck alongside No. 5 hatch (R. 2687) although the No. 2 hatch would receive constant heavy sea water in storms to be expected on the Great Circle Route while the preferred location for stowage of such acid cargo would be on the after deck near No. 5 hatch which was a more sheltered position and would not be subject too much to the storms (R. 2433, 2434, 2220 and 2705). The acid cargo was stowed two tiers high (instead of one high as requested by the Army) alongside the No. 2 hatch (R. 1004). The acid cargo was stowed in a crib, the chain over the top being shackled to deck padeyes, and tightened by turnbuckles (R. 1040, 1081). This brought the height of that stowage up to between five and six feet (R. 992 and 1039). The acetylene was also stowed on the forward deck (R. 1095-1096).

All holds of the vessel were completely filled with cargo, including the No. 5 hold which was stowed tight with cargo right up to the overhead (R. 1074 and 1746). At all times during the loading of the Government cargo, the States Steamship Company had aboard the vessel a shore based supercargo who was in charge of the loading of the vessel for States Steamship Company (R. 1156). The stowing of the corrosive acid on the forward deck was done sometime during the day on January 4, 1952, (R. 1110 and Exhibit 86). The supercargo reported the stowage of the acid cargo in that location to the States Steamship Company's Seattle office on the day that it was so stowed (R. 1166 and 1167) and the improper stowage was therefore brought directly to the notice of petitioner who became privy to such improper stowage. In fact, the Marine Superintendent, Mr. Vallet, testified (R. 284):

"A. When the vessel is *loaded and properly stowed and bunkered we advise the Master to that effect* and we leave it up to him when he should leave." (Italics supplied.).

The vessel completed loading on the morning of January 5, 1952, and cast off from Pier 37 shortly after 0800 on January 5 (R. 739). In addition to the boxes of corrosive acid carried as deck cargo, the vessel carried on the forward deck 26 two-wheel trailers (Exhibit 188). These trailers were stowed on the starboard side alongside No. 3 hatch (R. 1005). There were also two seven-ton carryall trucks stowed one on the starboard side of No. 4 hatch and one on top of the

No. 4 hatch (R. 1013, 1014) and their lashings were also secured to deck padeyes (R. 1050, 1051).

Crew members of the PENNSYLVANIA on Voyage V testified that the cross battens which were used to secure the forward hatches of the vessel were in a bent condition so that they were difficult to secure and keep secured (R. 2082, 2094, 2100 and 2101).

At the time the PENNSYLVANIA sailed on January 5, 1952, forecasts available from the United States Weather Bureau indicated that storms with winds of force 7 to 9 were prevailing in the Gulf of Alaska in the vicinity of Ocean Station Peter (Exhibit 176, identified R. 2267), which forecasts were available to the public including Petitioner's officers and its alter ego, Mr. Vallet. The States Steamship Company had no facilities in their shoreside offices to receive weather forecasts and were not interested therein, Mr. Vallet, the Marine Superintendent, testifying (R. 283):

"Q. Your office is not interested in weather forecasts?

"A. No."

and further on page 284:

"A. When the vessel is loaded and *properly stowed* and bunkered we advise the Master to that effect and we *leave it up to him when he should leave.*

"Q. *Even though there is a hurricane existing* at the time.

"A. Yes." (Italics supplied).

The only evidence as to weather actually encountered by the PENNSYLVANIA is contained in the

radio messages (Exhibit 127) which report winds of Beaufort force 9, with very high seas, (which is not considered unusual in the North Pacific in January, R. 2582).

Other reports of weather conditions in areas distant from the PENNSYLVANIA are therefore to be disregarded in favor of the weather conditions reported directly by the PENNSYLVANIA. There were approximately 17 ships reporting weather conditions from the general storm area on January 8 through 10, 1952 (R. 1594). The ships closest to the PENNSYLVANIA which proceeded toward her for the purpose of rescue sustained no substantial damage (Exhibit 135, page 44; Exhibit 123, pages 30 and 31; Exhibit 146(8), pages 47 and 48; Exhibit 47, pages 51 and 52; and R. 1658) and no vessel within the storm area other than the PENNSYLVANIA was lost.

ARGUMENT.

I.

THE PROXIMATE CAUSE OF THE LOSS OF THE PENNSYLVANIA WAS HER UNSEAWORTHINESS AT THE INCEPTION OF HER VOYAGE WHICH WAS WITH THE "PRIVITY AND KNOWLEDGE" OF PETITIONER THROUGH ITS MARINE SUPERINTENDENT VALLET.

The many faults, failures, breakdowns, defects and crack-sensitiveness found by the Court as "factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage"

(Finding V, R. 75, 76) proximately causing the loss of the PENNSYLVANIA with all her crew, personnel aboard and all of her cargo, included the 14-foot crack down the port side between frames 93 and 94, failure or breakdown of the steering systems, inability to steer for a time by any method in heavy seas, cargo adrift taking off tarpaulins on the forward hatches with the No. 2 hatch open and full of water. These faults, failures, breakdowns and defects are positively shown by the tragic radio messages from the master of the vessel and cannot be disputed. It is plainly apparent that they were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented the PENNSYLVANIA from meeting the expected and anticipated weather conditions (Finding V, R. 75, 76).

The error of the District Court in finding, in paragraph VI of its findings, that the unseaworthy condition of the PENNSYLVANIA at the inception of her voyage was without the privity and knowledge of the Petitioner lies in the fact that the Court failed to apply the admiralty doctrines of this and other Courts, holding that the Marine Superintendent, to whom the corporate owner had delegated the operation, manning, inspection and repairs of the vessel, was the alter ego of the owner, whose knowledge and privity is the knowledge and privity of the owner. (Assignment of Error, Points VI, VII) [*The CHICAGO SILVERPALM* (9th Cir.) 94 F.2d 776, 1937 AMC 1463.]

The alter ego of the Petitioner, according to testimony of Vice President J. R. Dant (R.2624), was its Marine Superintendent Lester A. Vallet, and, naturally, in his absence, Harve Brenneke, his assistant. The knowledge and privity of Vallet was that of Petitioner. He was in charge of the Marine Department "which in addition to the maintenance and repair of the vessel also is charged with the obtaining of personnel and the officers for the ships and maintaining the discipline of the vessels and also supplying and storing the ships." (R.140) He was in "charge of the repairs" and "supervision of what is necessary to be done on the vessels" (R.2623) and "inspection on behalf of (the) corporation." (R.2624). Since none of the corporate directors had any direct part in the operation of Petitioner's vessels (R.2618), Mr. Vallet had a broad scope of authority and did *not* have to receive authorization from the Board of Directors in order to be empowered to make extensive repairs (R.2624). In keeping with these complete powers of supervision and control of this part of Petitioner's business, *i.e.*, "the maintenance and repair of the vessel, the manning of vessels, obtaining crews and officers, the hiring and disciplining of officers and outfitting and stowing the vessels" (R. 241), Mr. Vallet was accurately described by Petitioner's proctor as "in charge of the men, equipment and everything about the ship in fitting it for her voyage." (R. 290).

The fact that the petitioning shipowner is a corporation, already possessing limited liability as a fea-

ture of its corporate structure, and exercising its fictitious personality only through human agents, distinguishes this case from those of individual petitioners. This distinction, extremely important in the limitation cases was clearly indicated by the Supreme Court in *Coryell v. Phipps,* 317 U.S. 406, 410, 1943 AMC 18, 21:

> "A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability."

As stated by the Second Circuit in *In Re P. Sanford Ross* (2d Cir. 1913), 204 Fed. 248, 251:

> "The Petitioner is apparently a large corporation having different departments of business, over one of which Campbell was superintendent. . . . While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority."

In *The ADMIRAL-CLEVECO,* 154 F. 2d 605, 1946 AMC 933, the Court of Appeals for the Sixth Circuit clearly ennunciated the principles of corporate privity and knowledge through its Marine Superintendent as follows:

> "Where a corporation is the owner of a vessel, the knowledge of the marine superintendent having general control and direction of its business is the knowledge of the corporate owner of the vessel, *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.,* 1 Cir. 256 Fed. 497, and within the

> section of the statute limiting liability, knowledge means not only personal cognizance but also the means of knowledge of which the owner or superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss unless appropriate means are adopted to prevent it."

It is very clear therefore, from the numerous American and Canadian cases, that a corporation is in privity with the actions, omissions, knowledge and means of knowledge of its Marine Superintendent, such as Mr. Lester A. Vallet, so that "any relevant act or omission of his would be the very action or omission of the Company." *The TRITON-BARANOF,* 1956 AMC 967, 970, (Supreme Court of Canada); *The ADMIRAL-CLEVECO,* supra; *In Re New York Dock Co.,* (2d Cir.) 61 F. 2d 777, 1932 AMC 1492; *The HUGH O'DONNELL* (S.D.N.Y.) 62 F. Supp. 239, 1945 AMC 812; *The VESTRIS,* (S.D.N.Y.) 60 F. 2d 273, 1932 AMC 863; *In Re Great Lakes Transit Corp.* (6th Cir), 81 F. 2d 441, 1946 AMC 267; *In Re Jeremiah Smith & Sons* (2d Cir. 1911), 193 Fed. 395; *Petition of Lakehead Transp. Co., Ltd.* (E.D. Wis.), 49 F. Supp. 929, 1943 AMC 333, affirmed (7th Cir.), 140 F. 2d 491, 1944 AMC 376; *Fort Worth Elevators Co. v. Russell* (1934), 123 Texas 128, 70 S.W. 2d 397. To the same effect is *The LINSEED KING (Kellogg & Sons, Inc. v. Hicks),* 285 U.S. 511, 1932 AMC 503, where the privity and knowledge of the works manager was held the privity and knowledge of the owner. In the following cases limitation of liability was de-

nied by reason of the privity and knowledge of certain employees to whom there was a delegation of authority to act on the part of the owners: *The NEW YORK MARINE No. 10,* (2d Cir), 109 F. 2d 564, 1940 AMC 347, (the agent on the dock, a managerial agent); *The POCONE,* (2d Cir.) 159 F. 2d 661, 1947 AMC 306, (the port engineer who was under both the Traffic Manager and the General Agent); *EDGAR F. CONEY AND TOW* (5th Cir.), 72 F. 2d 490, 1935 AMC 1122, (the marine superintendent); *The EDMUND FANNING* (2d Cir.) 201 F. 2d 281, 1953 AMC 86, (captain supervising stowage for shipowners).

It being established both by the evidence and the law applicable thereto that the knowledge, means of knowledge and privity of Mr. Vallet, the Marine Superintendent, was the privity and knowledge of Petitioner, attention is called on the one hand, to the fact that Petitioner has failed to sustain its burden of proving that none of the many faults, failures, breakdowns, defects and crack sensitiveness of the vessel was within the knowledge or privity of Mr. Vallet [See *The City of Brunswick* (D. Mass.) 6 F. Supp. 597, 1937 AMC 552 and authorities there cited.]

In *The REPUBLIC* (2d Cir. 1894), 61 Fed. 109, it has been very aptly stated by the District Court in 57 Fed. 240 at 243:

> "The barge was owned by a corporation, so it was the duty of this corporation, before dispatching the vessel upon the voyage in question, to know by the examination of some duly-appointed

officer whether the vessel was in a fit and seaworthy condition for the intended voyage. . . . The petitioners cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. An owner of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it was within his power to know." In affirming the case the Circuit Court said: "A loss is not occasioned without the knowledge or privity of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel. . . . In the present case the privity or knowledge of the corporation consisted of the negligence of its president, who, by his omission of proper care in his examination of the vessel, failed to discover her defective condition."

On the other hand, attention will be called in the following pages to evidence establishing the knowledge and means of knowledge of Mr. Vallet, the Marine Superintendent, to the crack sensitiveness of the PENNSYLVANIA to cold weather and rough seas, not only by his familiarity with the history of former cracks and defects in the deck and structure of the vessel, but by his personal knowledge of the 1946 reports of the Structure Committee on Welded Ships, which included the report of the sinking of the ESSO MANHATTAN by reason of her crack sensitiveness to cold weather and rough seas. The Court's atten-

tion will also be drawn to Mr. Vallet's knowledge or means of knowledge of the failure to inspect, clean and operate the hand steering gear, and failure to open up the main steering engines at any time. The Court's attention will further be called to Mr. Vallet's knowledge of the improper stowage of the acid cargo on the forward deck, and of the lashing of the heavy crib, and the seven-ton trucks to padeyes on the decks without any inspection for fractures and to the fact that unrepaired fractures under padeyes make the vessel unseaworthy according to Petitioner's own witnesses.

II.

THE PRIVITY AND KNOWLEDGE OF PETITIONER TO THE UNSEAWORTHINESS OF THE SS PENNSYLVANIA TO MEET THE EXPECTED PERILS ON HER GREAT CIRCLE VOYAGE BY REASON OF HER CRACK-SENSITIVENESS TO THE COLD TEMPERATURES AND ROUGH SEAS OF THE GULF OF ALASKA IS ESTABLISHED BY THE KNOWLEDGE OF ITS MARINE SUPERINTENDENT.

"The crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V * * *" as found by the District Court (Finding V, R. 75) is supported by the testimony of Morgan L. Williams, a metallurgist at the National Bureau of Standards (R. 1868), who tested the sample from the deck of the PENNSYLVANIA which had been forwarded to him for testing by the U. S. Coast Guard. Mr. Williams was "in charge of Project SR-106 on the study of plates which are fractured" (R. 1871) which was

sponsored by the Ship Structure Committee. It is to be noted that no request was made by Petitioner or its Marine Superintendent of the Bureau of Standards or of any metallurgist for a quick test of the samples taken of the deck plate in the vicinity of the 22-foot fracture, and in fact Vallet testified that no request for tests of the steel was made by him (R. 273). Mr. Williams stated (R. 1883) that the tests could have been made by any qualified metallurgist and that "The actual testing could be done in one day. The preparation of the specimens would take probably a week in the average shop. The chemical analysis might take a little longer." From the test made by Mr. Williams, it was shown that the 22-foot crack started from an old fracture by the padeye, which fracture "had been there before the last time it had been painted" (R. 1857). Although the Marine Superintendent knew that the PENNSYLVANIA would be declared unseaworthy by the U. S. Coast Guard if any fractures remained unrepaired (R. 648, 445) and that fractures were discovered around hatches Numbers 2, 3, 4 and 5 which were required to be repaired before the vessel could be passed for seaworthiness, there was no proof offered that the padeye or any other padeyes had been inspected after February of 1951 and prior to Voyage V, although it is apparent that such inspection would have shown the existence of the fracture that spread to 22 feet on Voyage V and constituted a Class 1 casualty.

Mr. Vallet testified (R. 209) that he was familiar with, and had read several times. "The Design

and Methods of Construction of Welded Steel Merchant Vessels" (Exhibit 185). This publication, which was the Final Report of the Board of Investigation convened by order of the Secretary of the Navy, 15 July 1946, contains at least 8 separate references to the ESSO MANHATTAN, related to the breaking apart of that vessel, due to its notch sensitivity, on March 29, 1943. Included in these references to the ESSO MANHATTAN (Exhibit 185, pp. 2, 3, 21, 30, 44, 64, 90 and 112) is a reproduction of the U. S. Coast Guard "Report of Structural Failure of Inspected Vessel" (Exhibit 185, p. 30) for the ESSO MANHATTAN which describes the breaking and states that: "The fracture started in a butt weld between plates A-9 and A-10 at the crown of the deck." (See the reported case, *The ESSO MANHATTAN* (S.D.N.Y.) 121 F. Supp. 770, 1953 A.M.C. 1152.)

The Marine Superintendent's familiarity with the publication together with his extensive experience fully warned him of the vessel's crack sensitiveness to the cold weather and rough seas which would be expected on a voyage through the Gulf of Alaska in January to the Orient. As stated by District Judge Wright, after previously referring to the Report of the Board of Investigation of the Ship Structure Committee (Exhibit 185) in *The ESSO MANHATTAN,* supra: 'The fact that the fracture was of the brittle cleavage type shows that the steel plate of the ESSO MANHATTAN was notch sensitive, which means that if a notch or abrupt discontinuity is present in the steel and the steel is below its critical temperature, it

will fracture, beginning in the area of the notch, with the application of far less energy than would normally be required. The critical temperature of steel is that temperature below which it will sustain a brittle cleavage fracture rather than a sheer fracture. It appears that a notch inhibits the plastic flow of the steel by concentrating the stress in the area of the notch with the result that when pressure is applied to notch sensitive steel below its critical temperature, it will tend to break rather than bend." It is to be noted that the crack reported by the radiogram from the vessel is described as 14 feet extending down into the engine room between Frames 93 and 94 (R. 221) starting in a butt weld and that the fracture of the ESSO MANHATTAN also started in a butt weld. There is no indication from the PENNSYLVANIA as to whether there were other fractures of the vessel forward which was causing the forward hold to fill with water forcing the vessel down by the head, as the master and crew were unable to "get forward to see where trouble is pumps holding in engine room" (Radiogram 1905GMT). It is apparent however that the reports of the crack sensitiveness of the ESSO MANHATTAN and her ultimate breaking in two pieces by reason of this sensitivity to cold weather was sufficient warning to the Petitioner through its Marine Superintendent to require immediate and exhaustive tests of the steel of the PENNSYLVANIA, which they did not make, and which if made, would undoubtedly have prevented the PENNSYLVANIA from making her Voyage VI via the Gulf of Alaska thus saving the lives of the

master and crew, the vessel herself and her cargo. In sailing the vessel on Voyage VI the Petitioner *knowingly took a calculated risk* which constitutes "privity and knowledge" such as to prevent the limitation of liability under the statute.

The warning and knowledge of what to expect in sailing the crack sensitive PENNSYLVANIA on the Great Circle route was there and the warning, and thus the liability through "privity and knowledge," could not be avoided by depending on regulations or inspections of the Coast Guard or of Marine Surveyors. In the first place the law does not allow the petitioner to so delegate its duties, and in the second place it has not been shown that the Coast Guard or the American Bureau of Shipping or other marine surveyors had the information, notice, and warning given to Vallet of the full history of the fracture condition of the vessel or, of such conditions, as shown in the reports in "The Design and Methods of Construction of Welded Steel Merchant Vessels" of the year 1946 (Exhibit 185).

This situation is clarified by the words of Judge Wolverton in *The NINFA* (D. Ore.), 156 Fed. 512, where he states at page 525:

> "I place but slight value on the surveys of the Italian Consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy".

The above words of Judge Wolverton must be considered as applicable in this case where no inspections were made of the padeyes other than those in the immediate vicinity of the 22-foot fracture and no tests made after the 22-foot fracture of the steel by Petitioner to determine the crack sensitiveness of the vessel after the warning given by the experience of the ESSO MANHATTAN especially when sailing the PENNSYLVANIA in the cold weather and rough seas of the Gulf of Alaska. See also: *Bank Line v. Porter* (4th Cir.), 25 F. 2d 843; *The OLANCHO,* 115 F. Supp. 107, 1953 A.M.C. 1040, where the Court said: "* * * her own revelation at sea of her actual unseaworthiness refutes the surveys and inspections * * *"; *The FELTRE* (9th Cir.), 30 F. 2d 62, 1929 A.M.C. 279.

The case of *Compagnie Maritime Francaise v. Meyer* (9th Cir.), 248 F. 881, is also applicable. In that case, where there was a claim for damage to cargo, this Court in holding that the carrier did not sustain the burden of proof to show due diligence to make the vessel seaworthy, stated (p. 885):

> "In the present case the court below was of the opinion that the testimony of the experts who inspected the vessel before her voyage began was not conclusive; that the inspection was general largely visual *and not particularly of the parts which proved defective.* The evidence, we think sustains that conclusion. There is no testimony that any of the inspectors made other than visual examination, except the witness Le Roy, who testified that he sounded with a hammer the ship's

sides, and all accessible rivets, but *that he could not examine all rivets for the reason that* at that date, August 27, 1907, *there was cargo in the hold.*" (Emphasis supplied.)

The warnings to and knowledge and privity of Petitioner's alter ego, Vallet, of the crack sensitiveness of the S.S. PENNSYLVANIA which warnings and knowledge he failed to convey to the doomed master (see *The CHICAGO-SILVERPALM* (9th Cir.), 94 F. 2d 776, 1937 A.M.C. 1427) plainly and unavoidably calls for the reversal of the finding of the District Court that the loss of the PENNSYLVANIA was without the privity and knowledge of Petitioner.

III.

HE PRIVITY AND KNOWLEDGE OF THE PETITIONER TO THE UNSEAWORTHY CONDITION OF THE STEERING GEARS OF THE SS PENNSYLVANIA CULMINATING IN THE INABILITY OF THE VESSEL TO STEER AROSE OUT OF THE KNOWLEDGE OF THE MARINE SUPERINTENDENT THAT THE GEARS HAD NOT BEEN PROPERLY OPENED UP, CLEANED AND INSPECTED.

One of the proximate causes of the sinking of the S PENNSYLVANIA is graphically set forth in the adiogram of January 9th, 1952, stating "1905 GMT * * CANNOT STEER * * * IF WE CANNOT FIX TEERING GEAR WILL REQUIRE ASSISTNCE" (Exhibits 127 and 128).

The evidence shows that the PENNSYLVANIA ad three separate methods of steering, one on the ridge which is the main steering engine, one in the

steering engine room itself called the hand steering, and one on the poop where they have a wheel called the emergency steering gear. The steering was operated by telemotor which is described as follows (R. 678):

> "The telemotor system consists of heavy copper piping from the wheelhouse to the steering engine room. That is filled with a nonfreezing liquid free of air, so that in the wheelhouse, if they want a right rudder, they turn the wheel to the right, and at the same time this ram that works off of your steering wheel builds up a pressure on one side that goes down to your telemotor system in the steering engine room. This in turn—that has a long spring on it. This in turn operates the mechanism between there and the hydraulic system to your rams. And your motor furnishes—there is two sets of motors that actually pump—that works the hydraulic to your rams. But the telemotor is the means between the bridge and the wheelhouse, through that mechanism there, of operating the ram that turns the rudder right or left."

The steering from the poop depends upon the operation of the telemotor, while the hand steering may be done with or without the telemotor in operation (R. 678, 679).

The claimants' contention that the steering engines were faulty was acknowledged by Counsel for Petitioner (R. 658):

> "Mr. Wood. * * * I would like to state to your Honor that it is one of the contentions against us in this case that the steering engine was not good.
>
> The Court. Yes, I recall."

Commander Hamilton of the Coast Guard in testifying concerning the entry in the Annual Inspection Report dated August 8, 1951 (Exhibit 53) on page 12 that the condition of the steering engine and controls was "good", described the tests used to determine their condition as follows (R. 658):

> "A. The steering engines are tested dually; that is, by the hull inspector and the boiler inspector when we get ready. When that steering engine is tested the hull inspector goes up in the wheelhouse with one of the mates."
>
> "A. Well, the chief engineer went back with me, and we witnessed—he starts the motor, the one or the other, and when he is ready there is a phone between the steering engine room and the wheelhouse, so I call the wheelhouse and tell the inspector up there, which was Lieutenant Rojeski, to move the rudder hard right or hard left. Then I watch the indicator in the steering engine room, the degrees the rudder turns. When it gets over to 35 degrees either right or left I call back over the phone amidships and then they turn the wheel in the wheelhouse until the rudder is neither right nor left; it is amidships. And then the opposite way. Well, of course I wouldn't remember whether I said right or left. It doesn't matter."

(R. 659 con't):

> "Then when the rudder has been turned 35 degrees either right rudder and left rudder, then I ask them, 'Are you in a midship position in the wheelhouse?' and they say, 'Yes.' "

Commander Hamilton further testified that the pumps which operate are not opened up on the annual inspection, but are all opened up on the four year survey (R. 687) and that on the annual survey on his inspection only the operating test was given and the engine was not opened up and the internal parts of it were not inspected (R. 689). Although Petitioner was put on notice that the claimants contended that the steering engines were faulty, there was no evidence of any further tests being given than that described by Commander Hamilton, and this test did not even show that the hand steering gear or the emergency steering were even operationally tested. If they had been so tested it is quite apparent that proof thereof would have been made. Vallet, the Marine Superintendent, was present during this annual inspection and knew of the tests which were and were not made.

From the description given of the steering engines it is apparent that there are numerous valves to be opened and closed and in the event that they are not used or tried out at least periodically, emulsion, rust, water, and foreign matters can collect so as to cause the system to fail. There was no evidence produced as to when the hand steering had been actually operated. From the radiograms it is apparent that all the three steering systems had failed, and that the vessel was rolling in the trough of the waves with the sea pouring into her holds for lack of the use of any one of the three steering systems which failed four days after leaving port.

The opinion of the Second Circuit in the case of *The A.H.F. SEEGER,* 104 F. 2d 167, is applicable to this situation, especially where the Court says at page 168:

> "* * * it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. * * * In such a case there is ordinarily fault on the part of the owner in operating a vessel that is not seaworthy and the law casts upon him the burden of showing not only what happened but what was done and what would have been necessary to avert the casualty. The Reichert Line, (2d Cir.) 64 F. 2d 13; Cranberry Creek Coal Co. v. Red Star Towing and Transportation Co. (2d Cir.) 33 F. 2d 272; In re Reichert Towing Line (2d Cir.) 251 F. 214, 217."

The Second Circuit in its previous holding *In Re Reichert Towing Line,* 251 Fed. 214, at 217, which involved failure of the crank pin of the crank shaft in the engine, in words so applicable to the instant appeal said:

> "Although the Reichert Company has been held liable for negligence, it will not be liable beyond the value of the tug, if it was without knowledge or privity of the insufficiency of the crank pin. The burden of proving this is on it. Its officers knew of the prior breaking of a steel crank pin of the same size, and no sufficient explanation of that accident is given. They do not show whether they knew the size of the pin, or whether they knew the prevailing practice as to the size of such pins, nor whether, if they did, they made any inquiry whatever as to what the

requirements of such crank pins should be, in view of the prevailing practice of employing a much stronger one. Although the boat had been inspected by the United States local inspectors some three or four months before the accident, and the owners employed an engineer to supervise their equipment from time to time, we do not think that they have discharged the burden of proving their want of knowledge or privity.

The decrees are reversed, and the court below is directed to enter a decree in the limitation proceeding, denying the petition, with costs, * * *"

The Fifth Circuit, in the case of *IONIAN PIONEER,* 236 F.2d 78, 1956 A.M.C. 1750, had before it a claim for cargo damage resulting from the stranding of the vessel, the lower court finding that the stranding was due to unseaworthy steering apparatus, that the owner did not exercise due diligence to make the vessel seaworthy and was not entitled to exemption under the exculpatory clauses of the charter party. In affirming, the Fifth Circuit so appropriately says:

"The libelant has never shirked its burden, *Commercial Molasses Corp. v. New York Tank Barge Corp.,* 314 U.S. 104, 1941 A.M.C. 1697, of affirmatively establishing a case under the contract of private carriage which warranted, at least, due diligence to make the vessel seaworthy, and by reflex, from this and the catch-all exculpatory clause so tenderly embraced by shipowner, imposed liability where the stated exception was not made out. *ZESTA* (5 Cir.), 1954 A.M.C. 899, 212 F. (2d) 137; *FRAMLINGTON COURT* (5 Cir.) 1934 A.M.C. 272, 69 F. (2d) 300.

It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' (1) navigational error, (2) stranding or (4) latent defect, 6) any other cause without actual fault or privity, *Folmina,* 213 U.S. 354 and certainly not if these were merely concurring causes. *Compania de Navigacion La Flecha v. Brauer,* 168 U.S. 104, 118; *Olga S.* (5 Cir.), 1928 A.M.C. 831, 25 F. (2d) 229.

"In this task, while ultimate risk of non-persuasion may have been on the cargo, it had the usual advantages of a bailor putting on the carrier, as the person having the means of knowledge, the obligation of coming forward with some explanation, *Commercial Molasses Corp. v. N. Y. Tank Barge Corp., supra; Northern Belle,* 76 U.S. 526; *Southern Ry. v. Prescott,* 240 U.S. 632, and a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. *Southwark,* 191 U.S. 1, *Olancho* (S.D.N.Y.), 1953 A.M.C. 1040, 115 F. Supp. 107; *Agwimoon* (D.C.Md.), 1928 A.M.C. 645, 24 F. (2d) 864, aff'r. (4 Cir.), 1929 A.M.C. 570, 31 F. (2d) 1006.

* * * * * * *

. . . "Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of sea-

worthiness from Helenic or Lloyds classification societies and which is certainly not the test, see *KNAUTH,* supra, page 187; Abbazia (S.D.N.Y.), 127 Fed. 495; *Poleric* (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; *Edgar F. Coney,* (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, the *record is completely silent of any serious inspection and survey of the entire steering machinery before this charter party voyage began.*" (Italics supplied.)

In the presence of Marine Superintendent Vallet, the last inspection given to the steering engines, [except when the shaft of the emergency steering gear was, in November 1951, freed of clothing (part of the cargo in No. 5 hold) which had shifted around the shaft of the emergency gear preventing its operation], was in August 1951 at the Annual Inspection, some five months prior to the sailing of the PENNSYLVANIA on her fateful voyage on January 5, 1952. At this Annual Inspection, Commander Hamilton and Lieutenant Rojeski of the Coast Guard gave the steering engine a mere operating test (R. 688) Commander Hamilton testifying (R. 688, 689):

"Q. When you inspected this steering engine on the Pennsylvania during your annual inspection, you told us that that was an operating test?

"A. Of the Steering engine?

"Q. Yes.

"A. That is right.

"Q. You watched it operate.

"A. That is correct.

"Q. And the engine was not opened up, and the internal parts of it were not inspected at that time?

"A. No, sir."

In the case of *The MEANTICUT-BEDFORD,* 65 F. Supp. 203, 1946 A.M.C. 178, the court had before it for decision a collision occurring when the steering gear jammed by reason of a short circuit in the electric wiring controls. In holding that a "routine operating test of the steering gear" was not sufficient to sustain the burden of inevitable accident defense, a latent defect, the Court said:

> "In addition to the survey by Lloyd's in January, 1940 [referred to above] there is a Lloyd's report dated July 20, 1941 of a survey and another report dated February 28, 1942 of one made on January 7, 1942, in both of which the 'steering gear and its connections' were reported 'Good.' However, MacCorkindale, Lloyd's representative who made the last two surveys, testified that no megger test nor electrical equipment examination was made on either of these surveys. Lloyd's inspections in 1941 and 1942 apparently were not full surveys, for although reports state the steering gear was examined, no electrical equipment was tested. In any event certificates of surveyors and inspectors are to be valued in the light of the actual facts disclosed. *The Doris Kellogg,* 1937 A.M.C. 254, 18 F. Supp. 159.
>
> * * * * * * *
>
> "According to the *Bedford's* deck log and the testimony of her Third Officer, a routine oper-

ating test of the steering gear was made on the morning of April 9, before sailing from the Bayonne and it was reported 'in good order.' The test consisted of repeatedly turning the wheel and watching the indicator."

The radio messages from the PENNSYLVANIA supply the evidence of the failure of the steering gear which was held to be lacking in *The IOWA,* (D.C. Ore.), 34 F. Supp. 843, where this same petitioner successfully obtained limitation of liability even though the IOWA was held unseaworthy and it was denied exoneration. In *The IOWA,* supra, Judge Fee held:

> "The petitioner bore the burden imposed by The Denali (Pacific Coast Coal Company v. Alaska Steamship Co., 9 Cir., 105 F. 2d 413 supra). It was proved that the *IOWA's* 'loss was not occasioned by any lack of seaworthiness' and that 'there was in fact no causal connection between the failure to install such a communication system and the loss of the ship'. The evidence upon which this finding is based indicates that the ship had been operated from Portland to Astoria by her main steering gear. The presumption in the absence of evidence is that the main steering gear was still in use at the moment of the strand. The behavior of the ship immediately prior to stranding and her radio messages indicate that no steering gear, however efficient, would have saved her."

The graphic words of the radiogram of January 9, "1905 GMT TAKING WATER NO. ONE HOLD DOWN BY HEAD CANNOT STEER * * * IF WE

CANNOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE * * *" supply the evidence which was so lacking in the IOWA, supra. The lack of inspection, cleaning and, if necessary, repairing, the steering system condemn the PENNSYLVANIA for unseaworthiness and the petitioner for knowledge and privity of such unseaworthiness which unquestionably calls for reversal of the District Court on the question of knowledge and privity and for the denial of limitation.

IV.

THE VIOLATION OF THE LAW REQUIRING SECURITY OF HATCHES AND THE IMPROPER CARRIAGE AND STOWAGE OF DECK CARGO WAS AN UNSEAWORTHY CONDITION PROXIMATELY CONTRIBUTING TO THE LOSS OF THE PENNSYLVANIA AND WAS WITH THE PRIVITY AND KNOWLEDGE OF THE PETITIONER.

The PENNSYLVANIA was carrying bulk grain and the securing of the hatches was not only of extraordinary importance but suitable hatch securing devices, in good condition, were specifically required by law. See Title 46, Code of Federal Regulations, Sec. 144.10-80, which reads as follows:

> "Security of Hatches. (a) Vessels carrying loose grain in bulk shall have suitable means of securing hatchways and other weather deck openings. Hatch covers and their supports shall be in good condition and properly battened down using good and sufficient tarpaulin, cleats and wedges where necessary.

The condition of the cargo, its stowage, bunkering and securing of the hatches was directly under the supervision of Marine Superintendent Vallet, as he stated (R. 284):

> "A. When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect, and we leave it up to him when he should leave."

The petitioner had the burden of proving compliance with the statute, Title 46, Code of Federal Regulations, Sec. 144.10-80, with respect to the securing of hatches which burden it failed to discharge. On the other hand, it is shown by the record that the petitioner failed to inspect and repair the battens and hatch securing devices and it appearing directly from the radio messages from the PENNSYLVANIA that water was entering the No. 1 and No. 2 holds and drifting cargo was taking the tarpaulins off the forward hatch, there is left little question that the statutory fault directly and proximately contributed to the cause of the disaster and sinking of the PENNSYLVANIA and was within the privity and knowledge of Marine Superintendent Vallet. Under these circumstances the PENNSYLVANIA Rule, applied in the case of *The PENNSYLVANIA,* 19 Wall. 125, 22 L.ed. 148, is directly applicable here. The Rule as stated by the Ninth Circuit in *The DENALI,* 105 F. 2d 413, is:

> "As this court, in reviewing and summarizing the cases, has said concerning this extraordinary burden of proof on violators of statutes governing

vessels and their navigation and management, 'Failure to obey a statute does, indeed, penalize the violator. The penalty, however, is not that the violator is to be held accountable for any mishap, regardless of its relation to the violation. The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. *This burden it is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.'* (Emphasis supplied.) The Princess Sophia, 9 Cir., 61 F.2d 339, 347."

The Petitioner arranged to carry the bulk grain in the lower hold of the vessel. Bulk grain is considered a dangerous cargo. (See deposition of Captain Bissett, Grain Warden for the Port of Vancouver (R. 802). In the carriage of this grain cargo, it was necessary to secure the bilge strainers with burlap (see testimony of foreman in charge of grain fittings, Neal McIver, R. 2638), and according to the testimony of Petitioner's own witness, a cargo surveyor, Alden Johnson, there would be practically no way of pumping out water if it once got into the cargo hold (R. 1220).

The uncontroverted testimony of three members of the PENNSYLVANIA's crew for Voyage V establishes that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secured at sea. See testimony of Alvin Huston, ship's car-

penter (R. 2081), Richard S. Brooks, ordinary seaman (R. 2094 and 2095), and Royce Cornwell, ordinary seaman (R. 2100 and 2101).

Captain Harry Johnson testified that a Victory ship sailing for a North Pacific voyage in January with cross battens that are in a bent condition so that they were difficult to secure and difficult to keep secure, would be unseaworthy and he would not go to sea with a ship under those conditions (R. 2434). Mr. Gilmour testified to the same effect (R. 2301).

The Petitioner was unable to rebut this testimony as to the condition of cross battens. Although it is established that a deckload of heavy timbers came loose and drifted around the forward deck of the vessel on Voyage V (R. 2095), there is no indication in the record that any inspection of the cross battens or other hatch fittings was made subsequent to that occurrence. Petitioner's only evidence in that regard was by Mr. Matthews, who testified at page 2830 of the record that it is the function of the engine department to repair cross battens and he received no request to make such repairs on the PENNSYLVANIA and never did repair any.

From past experience in the operation of this very vessel this company knew the danger of carriage of cargo or equipment on deck. On Voyage I, a spare propeller stowed on deck broke loose (R. 159), and was lost "overboard in a storm". On Voyage II, a reel of wire broke loose and cut through four tarpaulins on No. 2 hatch (R. 189, 190) which, Mr. Vallet stated, was "ordinary heavy weather damage" and

that "we have heavy weather damage on practically all the voyages". On Voyage IV, an acid cargo box came adrift causing damage (R. 190), the deck log reading: "Shipped over starboard after deck tearing acid cargo box adrift and damage forward starboard No. 4 boom rest; cargo shifting." On Voyage V, the deckload fore and aft got loose and was shifting (R. 190). According to the testimony of Petitioner's own cargo surveyors, heavy seas can tear off even a seaworthy deckload (R. 1231), and Richard A. Johnson, cargo surveyor, admitted (R. 1750), that it would be more dangerous to a vessel to sail with a deckload than without it, and he also stated that a deckload, once it breaks loose and is drifting around on deck, is dangerous (R. 1751). Petitioner also knew that heavy seas and rough weather were to be anticipated in the North Pacific at this time of year. As to the measure of duty of Petitioner, it is interesting to note the rule stated by Judge Learned Hand in *The POCONE* (2d Cir., 1947) 159 F.2d 661, 1947 A.M.C. 306, at 311.

There can be no possible argument that the carriage of deck cargo was a decision of any party other than the States Steamship Company. Mr. Pitzer, the head of the Operating Department, in charge of all cargo operations with States Steamship Company, testified that he advised the Army what space was available for their cargo for Voyage VI (R. 2775). Mr. Maurice, the Army Preplanner, testified that the entire deck space of the vessel was made available to the Army by the operators of the vessel (R. 2130). It is significant

that the testimony does not disclose that any of the other vessels which engaged in the rescue operations in this storm carried any deck cargo and none of them lost their hatch covers. See testimony of Captain Brown of the CYGNET III (R. 1677).

The decision of the Second Circuit in the case of *The WEST KEBAR,* 147 F.2d 363, 1945 A.M.C. 191, seems particularly applicable under its facts to the instant case. There the Court had under consideration a claim for cargo damage occurring on an Atlantic crossing. Cylinders of ammonia stowed on deck broke loose, plunged about the deck, broke off "kick tubes" and permitted sea water to enter 'tween decks in Nos. 4 and 5 holds causing damage to cargo stowed therein. In holding that the vessel was unseaworthy with respect to her deck cargo and denying the defense of Peril of the Sea, the Court appropriately says:

> "The first question is whether the ship was unseaworthy. Arguendo, we will assume that the 'kick tubes' did not make her so if she had carried no deck cargo; and, perhaps also, even when she carried certain kinds of deck cargo. Indeed, we might go still further, and assume that she was seaworthy, just as she rode, for a summer voyage, for example in the Mediterranean. But she was to cross the Atlantic in January, ending in latitudes over 40°; and the question is whether, with the deck cargo she actually did carry and the 'kick tubes' in her deck, she was reasonably fitted for such a voyage. The Silvia, 171 U.S. 462, 464; The Southwark, 191 U.S. 1, 9; Societa Anonima, etc. v. Federal Insurance Co., 1933 A.M.C. 323, 62 F.(2d) 769, 771 (2CCA); The

Smyrna, 1933 A.M.C. 231, 63 F.(2d) 1048, 1050 (4CCA); The J. L. Luckenbach, 1933 A.M.C. 980, 65 F.(2d) 570, 572 (2CCA); The Galileo, 1932 A.M.C. 1, 54 F.(2d) 913, 914 (2CCA). The fact that the 'kick tubes' had caused no trouble in the past was relevant, but far from conclusive; it took only a minimum of foresight to perceive that they would stand up against very little violence. True, as they were placed on the deck, they were out of the way; set either close to the bulkhead, alongside the hatch coamings, or around the mast. It would take a direct hit to break them off; but it would not take a heavy hit, and each one, if broken, would open a hole over an inch in diameter directly into the 'tween deck. An ammonia cylinder, weighing 200 pounds, free to plunge about on an open deck in a heavy seaway, was an engine before which such a fragile obstacle was no better than an eggshell. The safety of the cargo stowed below deck was therefore absolutely dependent upon the continued solidity of the pack; and, in the way the cylinders were made fast, that solidity depended upon each one's keeping its position in the pyramidal stack. As soon as one slipped out from between its fellows, the hold of the rest upon each other was lost, and all would inevitably escape. There were the nets, to be sure, but these did not go clear to the deck, and could not be expected to hold if they had, once the pack broke up.

"The consequences of any such break being so great, the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and 'catastrophic' storms; and such care the ship did not in fact bestow as the event proved. During the watch be-

tween 4 a.m. and 8 a.m. on January 11, the West Kebar's log records a wind force of 8 on the Beaufort Scale—39 to 46 miles—and for the watch from 8 a.m. to 12 m., '9-10'. Nine is a 'strong gale'—47 to 54 miles—; 10 is a 'whole gale' 55 to 63 miles. . . . * * *

"The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season. We cannot therefore agree that 'the damage to the cargo in the shelter or bridge decks, and the No. 5 'tween-deck and No. 5 lower hold was due to perils of the sea,' as the judge found. On the contrary, we are forced to conclude that the West Kebar is liable for entry of all sea water that she shipped on the after well deck."

Although the experience of the Petitioner in the carrying of deck cargo on previous voyages had resulted in heavy weather damage when crossing the North Pacific, the Petitioner decided to carry the Army corrosive acid cargo, refusing to stow this cargo aft by the No. 4 or 5 hatches, as requested by the Army, the master requiring that it be stowed forward near the No. 2 hatch. When the vessel sailed on its voyage in January 1952 via the Great Circle route with the expected gales and seas at that time of year with the cargo of white label corrosive acid on the forward deck, the PENNSYLVANIA was, like the

WEST KEBAR, unseaworthy in that she did not successfully meet the weather thus expected, and such unseaworthiness was with the privity and knowledge of the Petitioner as shown by the testimony of its Marine Superintendent Vallet who testified (R. 284), "When the vessel is loaded and properly stowed and bunkered, we advise the Master to that effect and we leave it up to him when he should leave. Q. Even though there was a hurricane existing at the time? A. Yes. * * *" Mr. Gilmore, an experienced Marine Surveyor with both extensive sea and shore experience, testified that the "PENNSYLVANIA was not seaworthy for a voyage across the North Pacific with acid stowed forward by the No. 2 hatch (R. 2339).

It just seems inconceivable that with the past experience of the deck cargo coming adrift and damaging hatch covers, that the acid cargo was carried on the forward deck with the knowledge and therefore the privity of the Petitioner. The liability of the Petitioner for the improper stowage of the cargo under such circumstances is held in *The SEGURANCA* (5 Cir.) 250 Fed. 19 and *The THAMES* (4 Cir.) 61 Fed. 1014. It is well established that stowage of articles which, if they come loose will imperil the safety of the ship, is one of the aspects of seaworthiness. *The INDIEN* (S.D. Cal.) 5 F.Supp. 349, 1933 A.M.C. 1342, aff'd (9 Cir.) 71 F.2d 752.

CONCLUSION.

The loss of the PENNSYLVANIA with her master, all of her crew, and cargo, presents herein questions for decision of this Court which will have great bearing upon the safety and protection at sea of the lives and property of American citizens. The tragedy of the PENNSYLVANIA is almost unparalleled in the North Pacific history of shipping, as there were no living survivors to tell of the causes of this great tragedy and no remnants of the vessel, not even a lifeboat, was ever sighted. It must be conceded by all parties that the evidence contained in the radio messages from the master of the vessel, sent immediately prior to the time of the death of himself and his crew, are, to the extent that they describe the immediate causes of the casualty and existing conditions, conclusive even against any opinion of experts who may have given testimony contrary thereto.

The findings of the District Court of the many faults, failures, breakdowns and defects (Findings IV and V) and that the storm in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered being of the kind to have been expected in January, and that the sole and proximate cause of the sinking of the PENNSYLVANIA was her own unseaworthiness, were amply supported—not only by the radiograms from the master of the ship but by the testimony and exhibits introduced in evidence.

The District Court erred, however, in failing to recognize that the Petitioner, in producing its evi-

dence, clearly proved and practically admitted that its Marine Superintendent Lester Vallet was the alter ego of Petitioner, having full charge of not only the operation of the PENNSYLVANIA, but also of the manning, repairs and upkeep of the ship. In other words, the "largeness" of his delegated authority unquestionably makes his knowledge and privity that of the Petitioner. All of the faults, failures, breakdowns and defects in the history of the vessel prior to the time Marine Superintendent Vallet sailed the vessel from Seattle through the cold temperatures and rough seas of the Gulf of Alaska were known to him including the available information of the expected perils on the voyage, which the PENNSYLVANIA could not be expected to and did not successfully meet.

The record in this case supplies the very evidence that was lacking in *The IOWA,* supra, in which latter case the Petitioner was denied exoneration but granted limitation because it was not shown that the steering gear on the *IOWA,* or the proper communication system between the bridge and the engine room, were not in fact operating. The graphic messages of the Master that the PENNSYLVANIA "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE" show the results of Petitioner's failure to thoroughly inspect the three steering systems, none of which were working, and neglect to make such repairs as would have insured against such failure. It may be likened to

sending a truck out on the freeway without checking the steering mechanism. It is apparent that the failure of the steering gears prohibited the master from keeping the PENNSYLVANIA's bow up into the waves and, for lack of steering, the vessel wallowed in the trough, broadside to, taking the full crest of the waves and green water with tremendous force on its decks. Marine Superintendent Vallet knew or was charged with knowledge of the crack-sensitivity of the vessel to cold temperatures and rough seas and he was charged with the knowledge which was available to him that on its voyage from Seattle to the Orient, the vessel would, in the Gulf of Alaska during the month of January encounter these conditions which proved so fatal to the PENNSYLVANIA. Furthermore, Vallet was fully charged with the responsibility for failure to open up the three steering systems, and to clean, inspect and make such repairs as might be necessary to insure the operation of this essential machinery. Instead of complying with the law as set forth in the various decisions of the Courts, he ignored his duties and attempted to escape responsibility for the loss of the vessel by relying on certificates of inspectors whom he personally knew did not have the information which he, Vallet, personally had. Furthermore, Vallet did not even inform the master of the PENNSYLVANIA that the vessel was crack-sensitive to cold temperatures and rough seas, which he knew or should have known from reading the reports of the Committee on Welded

Ships. (Exhibit 185), especially from reports concerning crack-sensitiveness of the ESSO MANHATTAN.

The Statutes passed for the safety and protection of life and property at sea with respect to the securing of hatches when bulk grain is carried were also violated as it was shown that the battens securing the hatches were broken and bent. Although it has not been fully argued, the Court's attention is called to the fact that although Vallet was charged with the proper manning of the vessel the Petitioner's own casualty department reported (Exhibit 24) that only 5 able bodied seamen were aboard the PENNSYLVANIA when the law required 6 able bodied seamen, and the record is not fully clear (R. 257) as to why such a report was made if, in fact, there were 6 able bodied seamen instead of 5 as reported.

It is respectfully submitted that the record in this case is so full of evidence showing the privity and knowledge of the Petitioner, through its Marine Superintendent Vallet, of the many faults, failures, breakdowns and defects of the PENNSYLVANIA, her crack-sensitivity to cold temperatures and rough seas and violation of law, that the District Court's finding and holding that the cause of the loss of the PENNSYLVANIA, her unseaworthiness at the inception of her voyage, was not with the privity and knowledge of the Petitioner and that Petitioner is entitled to limit its liability to the pending freight

should be reversed and decree entered against Petitioner in favor of the cargo claimants in the full amount of their loss.

Dated, January 4, 1957.

Respectfully submitted,

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No. 15131

United States
COURT OF APPEALS
for the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

UNITED STATES OF AMERICA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

THE DOMINION OF CANADA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees.*

BRIEF OF APPELLANT-PETITIONER, STATES STEAMSHIP COMPANY, ON APPEAL FROM INTERLOCUTORY DECREE ENTERED FEBRUARY 16, 1956

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-56

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BRIEF OF APPELLANT-PETITIONER, STATES STEAMSHIP COMPANY, ON APPEAL FROM INTERLOCUTORY DECREE ENTERED FEBRUARY 16, 1956

Appeal from the United States District Court for the District of Oregon.

JURISDICTION

Appellant, States Steamship Company, filed its petition in the U. S. District Court for Oregon, in admiralty, for exoneration from or limitation of liability growing out of the loss of its ship, the PENNSYLVANIA. The Cargo filed claims and answers. The jurisdiction of the District Court is based on Title 28 USCA § 1333 and Admiralty Rules 51 to 54 inclusive. Jurisdiction to review the District Court's decree, is conferred on this Court by Title 28 USCA § 1291, and § 1292(3). The petition is found on Pages 3-9 of the Transcript; the claims and answers on Pages 11-67.

CONCISE STATEMENT OF THE CASE

Petitioner-appellant's ship, the PENNSYLVANIA, sailed from Seattle for Yokohama, January 5th, 1952, with a full cargo, and was lost in a violent storm in the North Pacific January 9th, with all hands and all cargo. (Since there are numerous appellants in this proceeding, this appellant will hereafter be referred to as the petitioner).

The petitioner filed its petition in the United States District Court for Oregon, for exoneration from or limitation of liability.

Death claims were filed on behalf of the families of the lost seamen, and cargo-claims by the owners or underwriters of the lost cargo.

The Death Claims were all settled out of Court.

The trial proceeded on the issues between the petitioner and the cargo claimants. These were the United States of America, the Dominion of Canada, the Atlantic Mutual Fire Insurance Company, and the Pacific National Fire Insurance Company, the last two as subrogated underwriters.

The petitioner claimed that the ship was lost by a peril of the sea, a violent storm; that she was seaworthy; that petitioner had used due diligence to make her seaworthy; that if she had any defects, which was denied, they were latent, and claimed the benefits of the Carriage of Goods by Sea Act, 1936 (Title 46, USCA §§ 1300-1315), and its identical Canadian Act (I Edw. VIII, c. 49; 1936 A.M.C. Pages 1250-1258); that there was no liability, but if there was, it was without the privity or knowledge of petitioner; and that petitioner should have a decree of exoneration, or in any event of limitation.

The cargo claimants put these claims at issue.

The trial was held before the Honorable Dave W. Ling, as a visiting judge, in the Oregon Court, beginning July 13th, 1954, and ended August 10th, 1954. Briefs were submitted and, later on, oral argument was had at Phoenix, February 11th, 1955.

On November 17th, 1955, Judge Ling handed down his written opinion (Tr. 71-72; Appendix p. 1). In it, while holding the storm not to be a peril of the sea, and the vessel unseaworthy, he said that "what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty . . ." and

> "Upon an examination of the record I find that any defects in the vessel which caused her to sink were not apparent. Those charged with her inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without privity or knowledge of the owner of the vessel."

Since this reference to the defects as "latent", and the express holding that they were not "apparent", and that "those charged with her inspection used the care of reasonable and prudent persons" were unqualified, and were equivalent to due diligence, entitling petitioner to exoneration both under the Carriage of Goods by Sea Act, 1936, and the Canadian Act, petitioner submitted findings and a decree to that effect. Cargo-claimants submitted counter-findings.

A brief hearing was held at Phoenix February 10th, 1956, and Judge Ling accepted the Findings submitted by the United States, verbatim, with one short interpolation. These findings, in brief, held that the storm in which the vessel sank was not a peril of the sea; that a crack in the vessel's side, permitting sea-water to enter the engineroom, a failure or breakdown of the ship's steering system, taking water in No. 1 hold, deck cargo coming adrift, taking tarpaulins off the forward hatches, and No. 2 hatch being open and full of water were "factors of unseaworthiness, culminating from the unseaworthy condition of the vessel at the inception of her voyage", and that she was unseaworthy at the inception of her voyage without, however, stating what that unseaworthiness was; that the petitioner had not exercised due diligence to make the ship seaworthy, but was with-

out privity or knowledge of the unseaworthiness and was entitled to limit liability (Tr. 72-78; Appendix p. 2).

An interlocutory decree based on these findings was entered on February 16th, 1956 (Tr. 78-79).

This decree denies exoneration, holds petitioner liable up to the pending freight, $82,256.25, with interest, and grants limitation.

Petitioner, accepting the grant of limitation in its favor, appeals only from that part of the decree denying exoneration. This brief is devoted only to that.

On cargo-claimants' appeal from the limitation granted by the decree, the petitioner is the appellee, and as such will await those appellants' briefs on that issue, and will then, if necessary, file its brief as appellee.

The questions involved in petitioner's appeal are these:

1. Was the PENNSYLVANIA lost by a peril of the sea? Entitling petitioner to exoneration.

2. Was the PENNSYLVANIA seaworthy? Entitling petitioner to exoneration. Or, as claimed by the cargo-claimants, unseaworthy?

3. If not seaworthy, was due diligence used to make her seaworthy? Entitling petitioner to exoneration.

4. If there were any defects in her, causing the loss, were they latent and not discoverable by due diligence? Entitling petitioner to exoneration.

5. Was Judge Ling's Interlocutory Decree, holding petitioner liable up to the pending freight, and denying exoneration, in that respect, erroneous,

These questions arise generally on the whole record. Specifically, and more in detail, they are raised in this Court by petitioner's Statement of Points on Appeal Tr. 2939-2940, and the following:

SPECIFICATIONS OF ERROR

I.

The court below erred in its finding No. III that the storm was not of such magnitude as to constitute a peril of the sea; was of a kind reasonably to have been expected; that all other vessels withstood it; and that the sole and proximate cause of the vessel's loss was her own unseaworthiness. These findings are contrary to the great weight of evidence, and are clearly erroneous (Tr. 2939).

II.

The court below erred in its findings No. IV and V holding, in substance, that the factors therein mentioned were "factors of unseaworthiness"; that they culminated from the unseaworthy condition of the vessel at the inception of her voyage (without stating what that unseaworthy condition was) which prevented her from meeting the expected and to be anticipated weather conditions, and proximately caused her loss. These findings are against the great weight of the evidence and are clearly erroneous. Collateral, or incidental to the main error, the reference to "the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous voyage", if it be accepted as a finding (though not express), is erroneous because (1) unsupported by any

competent evidence that the vessel was "crack-sensitive", and (2) certainly not crack-sensitive "by reason of" (i.e. caused by) the previous crack. It may be added that the finding that the vessel was "completely unable to steer by any method" overstates the radiograms (Tr. 2939).

III.

The court below erred in its finding No. VI and conclusion No. II that the evidence was insufficient to show that, and the petitioner did not, use due diligence to make the vessel seaworthy, entitling petitioner to exoneration. This finding and conclusion are contrary to the great weight of the evidence, and are clearly erroneous (Tr. 2939).

IV.

The court below erred in its conclusion No. IV that the cargo interests should recover up to the amount of pending freight.

V.

The court below erred in not finding and concluding:

1. That the vessel was lost by a peril of the sea;
2. That she was seaworthy at the inception of her voyage;
3. That due diligence was exercised by petitioner before and at the beginning of her voyage to make her seaworthy;
4. That if there were any defects in her, (which we do not admit) they were latent, and not discoverable by due diligence.

And in not entering a decree of exoneration, based on one or all of such findings and conclusions (Tr. 2939-40).

ARGUMENT ON THE WHOLE CASE

FIRST—THE LAW APPLICABLE

Summary:

The cargo loaded at Vancouver, B. C. was carried under bills of lading incorporating the Canadian Water Carriage of Goods Act, 1936 (Exhs. 130, 131); and the cargo loaded at Seattle was carried under a contract incorporating the United States Carriage of Goods by Sea Act, 1936, familiarly known as COGSA (Ex. 132B). These acts are practically identical. The rights and immunities of the parties are governed by them.

1. Under them, there is no warranty of seaworthiness. It is abolished.
2. In that respect, the carrier is only bound to use due diligence to make the ship seaworthy at the beginning of the voyage.
3. The carrier is not liable for damage or loss arising or resulting from:
   (a) Unseaworthiness unless caused by want of due diligence to make the ship seaworthy;
   (b) Act, neglect or default of the master in navigation or management of the ship;
   (c) Perils, dangers and accidents of the sea;
   (d) Act of God;
   (e) Latent defects not discoverable by due diligence.

46 U.S.C.A. §§ 1303(1), 1304(1) and (2).

Burdens of proof:

The cargo claimants having proved the loss, the burden is on the petitioner to bring itself within one of the exemptions, i.e., perils of the sea, act of God, act of the master, latent defects, etc. The petitioner having done so, the burden shifts to the cargo to prove petitioner's negligence, or unseaworthiness causing the loss. If cargo proves unseaworthiness, petitioner is nevertheless exonerated if it proves due diligence. Applying these statutes and rules to the facts of this case, petitioner should be exonerated.

Amplifying the foregoing summary:

First, there is no warranty of seaworthiness. This was accomplished directly in the Canadian Act by the following language:

> "3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

and by §§ 3(1) and 4(1) of the United States Act, limiting the resopnsibility of the carrier with respect to seaworthiness to the exercise of due diligence before and at the beginning of the voyage. 46 USCA §§ 1303(1), 1304(1); Knauth, Ocean Bills of Lading, 192 (4th Ed. 1953). The Toledo, 30 F. Supp. 93, aff'd. 122 Fed. (2d) 255. Cert. Den. 314 U.S. 689.

The rights and immunities of the carrier and shipper have been sufficiently stated in the summary above. The statutes themselves (the pertinent parts) are printed in the appendix.

The burdens of proof, as stated in the summary, are well understood. They are succinctly stated in Kurth Malting Company v. Colonial Steamships, Ltd. (1953), Ex. C.R. 194 (Exchequer Court of Canada), as follows:

> "The defendant carrier having admitted the receipt of the cargo in good order and condition, and the loss suffered during the voyage, the burden of proving its defense that the loss was suffered by perils, dangers and accidents of the sea falls upon the defendant carrier if it is to escape responsibility for the loss or damage. It was admitted by counsel for all parties that if the defendant satisfied this onus then the onus would be upon the plaintiff to show unseaworthiness of the vessel, to which the defendant's answer would be that it had exercised due diligence to make the ship seaworthy."

See also, The Iristo, 43 F. Supp. 29, at page 37, and The Aakre, 31 F. Supp. 8, at page 11. Scrutton on Charter-parties, 16th Ed., p. 482.

It is *not* a condition precedent to claiming the exemptions of the acts to prove (as is the case under the Harter Act), due diligence to make the ship seaworthy:

> "The 1936 statute does not condition these exemptions on due diligence to make the ship seaworthy. It is only liability for loss due to unseaworthiness that is so conditioned. This last is made clear by the wording of the prior section. Section 4(2) of the 1936 Act does not say as the Harter Act does, that 'if the owner . . . shall exercise due diligence to make the vessel . . . seaworthy' he shall be given immunity." Robinson on Admiralty, 1939 Ed., pp. 505-506.
>
> "Under the Canadian Act due diligence is *not* made a proviso of any of the exceptions, but is to be considered separately therefrom." The Aakre, supra, at page 11. The Vale Royal 51 F. Supp. 412,

424; Isbrandtsen v. Federal Insurance Co., 113 F. Supp. 357-359; aff'd. 205 F. 2, 679; Cert. Den. 74 U.S. Sup. Ct. 106.

WHAT HAPPENED TO THE SHIP—THE SHIP'S RADIOGRAMS

It will facilitate a better understanding of the case if we first set forth just what happened to the PENNSYLVANIA, for this affects, to a greater or less degree, all of the Specifications of Error which we shall later discuss.

What happened to the PENNSYLVANIA is known only from her radiograms. We shall shortly list them in chronological order. But before doing so give this word of explanation as aid to the Court.

In the radiograms the following symbols indicate ships or stations:

KTOG indicates the CYGNET III

KWTC indicates the PENNSYLVANIA

NAN indicates the weather station NAN, which was the weather ship WINONA at sea

NMJ indicates the Coast Guard Station at Ketchikan (Pt. Higgins) Alaska

NMW indicates Seattle and Grays Harbor Coast Guard Station

KLB indicates the Mackay Radio Station at Kent, near Seattle

VOLE indicates the Commandant, 13th Coast Guard District

OX indicates "to operations" and means that the message is addressed to all "operations" of the Coast Guard in this area

The letter X in a message is a symbol for a period and the letters BT are a symbol for a break or a period.

Radio traffic is all carried on in Greenwich Meridian Time, the designation for which is GMT, or Z. Both mean the same thing.

In transposing GM Time to Pacific Standard Time, or vice versa, or GM Time to ship's time in the longitudes where the PENNSYLVANIA or other ships were, these approximate additions or subtractions must be made:

To transpose GM Time to Pacific Standard Time, deduct 8 hours, and conversely, add 8 hours for the reverse transposition.

To transpose GM Time to ship's time, in the longitudes where the PENNSYLVANIA and the other ships were, deduct 9 hours, and conversely, add 9 hours for the reverse transposition.

To transpose Pacific Standard Time to ship's time, deduct 1 hour, and conversely, add 1 hour for the reverse transposition.

The time and position beginning a message does not mean the time it was sent; it indicates the ship's position at that time. Unless something in the message itself clearly indicates when it was sent, the time of sending can be determined by the time at which it was received.

In quoting the messages below, we have occasionally interpolated in parenthesis the meaning of symbols therein.

We now proceed to the messages themselves. They are found in Exhibits, 97, 108 and 127, the latter being a whole group of messages introduced as one exhibit:

1. The PENNSYLVANIA was, like many others, a weather-reporting ship, and the first message, at 1435

GMT, was a report from her weather-reporting officer to the United States Weather Bureau. It was:

> "WIND 292° VEL 45-50 MPH SEA HT MOUNTAINOUS" (Exh. 97).

2. The next message, sent at 1443 GMT, was from the PENNSYLVANIA to the Coast Guard. It read:

> "1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL (from) DECK HALF WAY DOWN ENGINEROOM PORT SIDE WIND WNW 9 VERY HIGH WESTERLY SEA VESSELS IN VICINITY PSL (please) QRX (stand by) and QSL acknowledge receipt) DE (from) KWCT (PENNSYLVANIA) AR (end of transmission)" (Exh. 127).

3. The next message was from the PENNSYLVANIA to States Steamship Company via Mackay Radio, San Francisco, thence by Western Union to Portland where it was received at 7:11 A.M. (1511 GMT) and reached owners' office at 8:20 A.M. It read:

> "1400 GMT POSITION 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL IN ENGINEROOM BETWEEN FRAMES 93 AND 94 IN WELD STARTING IN SHEER STRAKE AND RUNNING DOWN ABOUT 14 FEET WILL TURN AROUND AS SOON AS POSSIBLE AND PROCEED SEATTLE" (Exh. 108).

4. States Steamship Company answered this message as follows:

> "MASTER PENNSYLVANIA. USE TURNBUCKLES TO HOLD CRACK IN COMPRESSION STARTING FROM DECK HEAD. ADVISABLE TO DRILL END OF CRACK WITH AIR DRILL STOP WHAT ARE WEATHER CONDITIONS KEEP US INFORMED. STATES LINE." (Exh. 127).

But, Mackay Radio advised that the message was never received by the ship.

5. The fourth message from the ship appears to have been a broadcast intercepted by the Coast Guard in Seattle at 0729 P.S.T. (1529 GMT). It read:

> "1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST HULL CRACKED 14 FEET DOWN PORT SIDE INTO ENGINE-ROOM VESSEL TAKING WATER BUT CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE. VESSELS IN VICINITY PSE (please) KEEP CLOSE WATCH BT (break) DE (from) KWCT (PENNSYLVANIA)" (Exh. 127).

6. The next was a message from the Coast Guard at Seattle at 0827 P.S.T. (1627 GMT) to the master of the PENNSYLVANIA as follows:

> "ADVISE INTENTIONS CMA COURSE AND SPEED" (Exh. 127).

7. To this the PENNSYLVANIA replied, at 1007 P.S.T. (1807 GMT) as follows:

> "091730Z GMT 51.09 N 141,31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CAN'T STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINEROOM" (Exh. 127).

8. The next message is from the Coast Guard radio station at Westport, Washington, to "operations" and was received by the Seattle Coast Guard at 1035 P.S.T. It is thus not a direct message from the ship but recites a message received from the ship. It reads as follows:

> "TO OX RECEIVED FROM SS PENNSYLVANIA ON 8280 KCS X AT 1750 GMT 51.11 NORTH 141.17 WEST BT (break) 09 1824" (Exh. 127).

9. The next message was from the ship direct to States Line (Petitioner) via Mackay Radio KLB, Kent, Washington, a suburb of Seattle. It was received at 11:30 A.M., P.S.T. (1930 GMT) and reads as follows:

> "1905 GMT TAKING WATER NUMBER 1 HOLD DOWN BY HEAD CANNOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINEROOM. IF WE CANNOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE. VERY HIGH SEAS. CANNOT GET ON DECK AT PRESENT. DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES. CANNOT GET ON DECK TO SECURE. MASTER." (Exh. 127).

10. The next message was received at the Coast Guard Station at Pt. Higgins at Ketchikan, Alaska, and was at 1930 Z transmitted to the Coast Guard at Seattle. It records the first S.O.S. sent from the ship at 1920, and reads as follows:

> "FOLLOWING RECD ON 500 KCS QUOTE SOS SOS SOS SOS DE (from) KWCT (PENNSYLVANIA) KWCT KWCT BT (break) SS PENNSYLVANIA AT 1920 LAT 51.09 N. 141.13 W RPT (repeat) 51.09 N 141. 13 W TAKING WATER IN ENGINEROOM AND NR ONE HOLD DOWN BY HEAD REQUIRE AID AR (end of transmission) DE (from) KWTC (PENNSYLVANIA) HW (how about it?) UNQUOTE" (Exh. 127).

11. At 2115 Z the Coast Guard at Seattle received the following message from NAN (weather ship "Winona"). It is not a message direct from the PENNSYLVANIA but is a summary of various messages exchanged between the "Cygnet III" and the PENNSYLVANIA and the Coast Guard Station at Ketchikan and relayed by

NAN. That summary records the second S.O.S. as having been sent by the ship at 2015 Z and reads as follows:

> "FOLLOWING RECEIVED ON 500 KCS AT 1956 Z QUOTE KWCT (to PENNSYLVANIA) DE (from) KTOG (CYGNET III) POSN 49.10 N 142.35 W HAVE HIGH SEAS. DID YOU GET ASSISTANCE YET AND WHAT YOU NEED. (PENNSYLVANIA replied) NOT YET BUT HOLD ON PUMPING ALL OIL FM (Probably "From"—message unfinished)—WEATHER STILL PRETTY—UNQUOTE"
>
> "AT 2015Z SUGAR OBOE SUGAR (SOS) DE (from) KWCT BT PENNSYLVANIA 1920 GMT PSN 51.09 N 141.13 W TAKING WATER IN ENGINE ROOM AND NR ONE HOLD TARPS FWD HATCHES STILL HOLDING USING HAND STEERING NEED ASSISTANCE AR DE KWCT (end of transmission from PENNSYLVANIA) — KWCT DE NMJ (to PENNSYLVANIA from KETCHIKAN) RR (received your) SUGAR OBOE SUGAR AR (end of transmission)"
>
> "AT 2021Z QUOTE FM SS CYGNET IS OUR ASSISTANCE NEEDED PLEASE GIVE PLENTY TIME DUE TO SEAS WE ESTIMATE 24 HOURS FROM YOUR POSN PLEASE ADVISE BT MASTER"
>
> "AT 2024 UNKNOWN STATION SENDING VVV DE NMC QRT (this means that an unknown station was testing (VVV) and was told by C.G. at San Francisco (NMC) to get off the air)—BT K" (Exh. 127).

12. The next message was a message from the Coast Guard Station at Pt. Higgins, Ketchikan, Alaska, to "OX" (operations) relaying a message from the PENNSYLVANIA. The time the PENNSYLVANIA sent it was 10005 Z (i.e. 005 Z on the 10th, as indicated in the

repeat of the same message in No. 16 following. This was the message:

> "TO OX FOLLOWING FROM PT HIGGINS / NMJ X (period) SS PENNSYLVANIA / KWCT QUOTE HAS GOT STEERING GEAR FIXED BUT CAN'T STEER AS RUDDER TOO FAR OUT OF WATER NR 2 HATCH OPEN AND FULL OF WATER X (period) LOOKS LIKE ONLY HOPE IS FOR WEATHER TO MODERATE BT (break)" (Exh. 127).

13. At 1631 (4:31 P.M., P.S.T., 0031 GMT on January 10th) the United States Coast Guard Station at Westport relayed the following message to operations:

> "TO OX FROM PT HIGGINS / NMJ X SS PENNSYLVANIA / KWCT STATES THEY ARE GOING TO ABANDON SHIP BT" (Exh. 127).

This message from the PENNSYLVANIA itself was sent at 100022 Z (0022 Z on the 10th) as indicated in the repeat of the same message in No. 16 following.

14. At 1644, the Coast Guard Station at Westport relayed to operations this message:

> "TO OX FROM PT HIGGINS / NMJ X SS PENNSYLVANIA / KWCT STATES HAS 45 MEN ABOARD AND 4 LIFE BOATS BT" (Exh. 127).

This message from the PENNSYLVANIA was sent at 100027 Z (0027 Z on the 10th) as indicated in No. 16 following.

No. 16 also includes a message (not in the list as a separate exhibit) "Leaving Now" sent at 100030 Z.

15. Later the Coast Guard Station at Westport broadcast to operations:

"TO OX FROM CYGNET III / KTOG AT 0310Z NMW DE KTOG BT KWCT LEFT SHIP AT 0030 GMT BT" (Exh. 127).

16. The foregoing series of final messages is summarized and repeated by the U. S. Coast Guard Station at Pt. Higgins, which also relayed them to the Coast Guard at the Westport Station and to the Coast Guard vessel "Klamath", in the following message:

"FOLLOWING RECD FROM KWCT on 500 KCS at 10005Z QUOTE NMJ (Pt. Higgins) DE KWCT BT GOT STEERING GEAR FIXED BUT CAN'T STEER AS RUDDER TOO FAR OUT OF WATER NR 2 HATCH OPEN AND FULL OF WATER LOOKS LIKE ONLY HOPE IS FOR WEATHER TO MODERATE UNQUOTE FOLLOWING RECD FROM KWCT ON 500 KCS AT 100022Z QUOTE SOS NMJ DE KWCT LOOKS LIKE WE HAVE TO ABANDON SHIP UNQUOTE FOLLOWING RECD FROM KWCT ON 500 KCS AT 100027Z QUOTE 45 PERSONS ABOARD 4 BOATS UNQUOTE FOLLOWING RECD FROM KWCT ON 500 KCS AT 100030 Z QUOTE LEAVING NOW UNQUOTE X ALL FOREGOING INFO PASSED TO CG RADSTA WESTPORT WASH AND UNSCGC KLAMATH BY THIS STATION X KWCT UNHEARD SINCE 100030Z" (Exh. 127).

Bearing in mind that the PENNSYLVANIA, on the Composite Great Circle Course, would be steering about 290 degrees and had already been in the storm for many hours, the foregoing radiograms may be condensed into the following narrative. All times in this narrative will be stated in ships' time, by deducting 9 hours from the G.M.T.

On the morning of January 9th about 5:35 A.M. the PENNYLVANIA, in Lat, 51.09 North Long. 141.31 West. bucking a 292 degree (W.N.W) head wind of 45-50 miles perhour and mountainous westerly seas, suffered a crack in her port side in the way of the engineroom, extending from the sheer strake 14 feet down the vessel's side; although some water was entering the engineroom, the pumps were able to handle it. In this situation the master determined to turn around as soon as possible and return to Seattle.

By 9:27 A.M. he had turned around and was endeavoring to steer a course of 110 degrees (the course back to Seattle), but was having some unidentified trouble with his steering and was taking water in the No. 1 hold and the engineroom.

At 10.05 A.M. he reported that the vessel was still taking water in the No. 1 hold, was down by the head, and that he couldn't steer or get forward to see where the trouble was, but the pumps were still holding in the engineroom; that if he couldn't fix the steering gear, he would require assistance. The seas were continuing very high; the deck load was adrift, taking the tarpaulins off the forward hatches, and the crew couldn't get on deck to secure it or the hatches.

10:20 A.M. he sent out his first SOS and said the ship was taking water in the engineroom and No. 1 hold, was down by the head and he would require aid. The "Cygnet III" having asked whether he had assistance yet and what he required, he replied he had not received assistance yet and was pumping oil. The message

was unfinished. Perhaps he meant from the forward tanks.

At 11:15 A.M. he again sent out an SOS and repeated that the ship was taking water in the engineroom and No. 1 hold, but added, this time, that the tarpaulins on the forward hatches were still holding and that he was using hand steering but would need assistance.

At 3:05 P.M. he radioed that he had got the steering gear fixed but couldn't steer because the rudder was too far out of water (by reason of the vessel being so far down by the head) and that the No. 2 hatch was open and full of water and it looked as if the only hope was for the weather to moderate.

At 3.22 P.M. he radioed that he was going to abandon ship; and 5 minutes later that he had 45 men aboard and 4 lifeboats.

At 3:30 P.M. he abandoned ship, and neither he nor any of the crew was ever heard of again.

Specifications Nos. I and V: The Court Erred in Holding That the Storm Was Not a Peril of the Sea—"Perils, Dangers and Accidents of the Sea" (COGSA)—and That It Was Not the Cause of the Sinking of the Ship. Finding No. III.

Argument

SUMMARY

The storm which sank the PENNSYLVANIA was one of the worst, if not the worst ever experienced in that area, as evidenced by the testimony of the captains who survived it, of a meterologist and an eminent scientific oceanographer; and by the *official* weather records of the Canadian and United States Governments. That it was a peril of the sea, as understood in both the United States and Canadian Acts, and as defined by many admiralty courts, will be demonstrated. The Court erred in not so holding and in not holding that it, and not the ship's unseaworthiness, caused her loss.

The PENNSYLVANIA really encountered two storms. The first was January 7th-8th. A brief lull intervened; and then came a second, greater storm, January 9th-10th. These are known in the testimony as Storms Nos. 1 and 2. Storm No. 1 was itself a peril of the sea, and the PENNSYLVANIA's surviving it, is itself proof of her seaworthiness. Storm No. 2 sank her.

First, let us hear from the captains of those ships which survived. As actual participants, eye witnesses, they certainly should be listened to. All but one, Captain

Brown, testified by deposition. This Court, therefore, is in just as good a position to judge their testimony, as was the trial court.

The SHOOTING STAR

At the S.O.S. Captain Reid, of the SHOOTING STAR, was 200 miles WSW of the PENNSYLVANIA (Tr. 1775). His log book, introduced with his deposition (Ex. 135), shows repeated entries of taking heavy green water over the bow and sides and rolling and pitching heavily. The entries are too numerous to quote. A sample is the entry on January 9th on the 0:00 to 4:00 watch.

> "Very high WNW seas and swells. Vessel rolling and pitching heavily. Green seas over bow and starboard side."

And on the 4:00 to 8:00 watch:

> "Very rough seas and height NWly swell. Shipping green seas over bow and main deck fore and aft and boat deck."

Certainly shipping *green seas* on the *boat deck* of a large ship like the SHOOTING STAR (aC-2) indicates a storm of the greatest intensity. This was the very time the PENNSYLVANIA was in trouble. There are many more like entries. During this same period from noon of January 8th to noon of January 9th, for 16 hours, they had "constant waves of 50 feet, and occasionally we would get a 70- to 75-foot roller in amongst the lot of those waves" (Tr. 1766). He testified that the waves recorded by his mates were from 50 to 59 feet; that they averaged 50 feet and were "mountainous" (Tr. 1793-

1794); and when asked about their steepness, said, "It is like riding in a Crosley having a van roll down on top of you" (Tr. 1794). He stated again that there were occasional rollers of 70 to 75 feet (Tr. 1768); and that occasionally they would "take one up on the bridge which would come into the wheel house" (Tr. 1770). Although he had been in typhoons and had passed through the center of one "the waves were not as high nor as consistent as we had in this storm" (Tr. 1828-1829). His ship suffered heavy damage as shown by the Sasebo Shipyard repair bill (Tr. 1783). It included, among other items a heavy longitudinal steel deck I-beam, a main member, like a bridge girder, in the forepeak distorted and split, deck plates on the fo'c'sle head set in, "Ten fo'c'sle head deck beam knees split, welds and loosened rivets—2 in the same condition port side"; a deck plate cracked in the way of No. 3 hatch; damage to lifeboats; damage to the bridge deck 45 feet above the water, and other items (Tr. 1783-1788).

We hope the Court will inspect his log (attached to Ex. 135) and read his whole deposition. It is summed up in this statement: "I have never seen a storm of that violence in all the time I have been at sea" (Tr. 1778).

The KAMIKAWA MARU

At the S.O.S. Captain Maeda, of the Japanese ship KAMIKAWA MARU, was 100 miles SW of the PENNSYLVANIA (Tr. 527, Ex. 47). He had been 35 years at sea, on all oceans. Yet in all that time, and on all those oceans (including of course the dangerous typhoon

China Seas) he had seen only 2 or 3 such storms (Tr. 524, 535, Ex. 47).

He continued that the waves were 15 meters high (equals about 49 feet); rolling and steep and dangerous for a deep draft ship (Tr. 531); that he was light but would have been fearful for his ship had he been loaded and heading into the storm instead of running with it (Tr. 536); that he received the S.O.S. from the PENNSYLVANIA at 1925 GMT, equivalent to 9:52 A.M., ship's time (Tr. 526), but that it was not until 2230 GMT, *three hours and five minutes later, that he was able to change his course to go toward the PENNSYLVANIA;* that to go to her he would have had to steer 20°, but because of the severity of the storm he could not bring his ship around to steer that course; that the best course he could make was 60°, and the drift caused by the storm set him off an additional 30°, so he was only making a course of 90° (in other words—70° off the desired course) (Tr. 527-530). His log book attached to his deposition (Ex. 47) shows winds of force 8 and 9 with very high seas and ship laboring heavily. On January 8th, the entry for 2000 is:

> "Sea tremendous, ship laboring heavily and shipping seas on aft deck at times."

And for 2400 is: "Sea tremendous, ship laboring heavily on NWly heavy swell."

At 0800 (on the 9th): "Sea tremendous, ship laboring violently and shipping sea on aft deck at times."

At 1925 GMT: "Received SOS, PENNSYLVANIA",

then gives respective positions:

At 1000 (1933 *Z*): "A/Co (alter course to 60° for salvaging SS PENNSYLVANIA."

At 1200: "Sea tremendous with NWly very heavy swell." "Always trying to A/Co (alter course) to distress position unsuccessful."

At 1600: "Sea tremendous, ship laboring heavily with NWly heavy swell."

At 1900: "Trying A/Co (alter course) to distress position unsuccessful."

At 2000: "Sea tremendous, ship laboring violently on NWly abnormal swell."

At 2230: "A/Co (alter course) to 320°."

At 2400: "Sea tremendous with NWly swells, ship pitch-heavily and shipping sprays on deck all times."

We urge the Court to read this man's log and his testimony. If he could not even turn his ship *toward* the PENNSYLVANIA for three hours after the S.O.S. though life was at stake, what greater proof could there be of the violence and danger of the seas?

The CYGNET III

At the S.O.S. Captain Bennis B. Brown of the CYGNET III was 120 miles south by west from the PENNSYLVANIA (Tr. 1651). The pages from his log book (Ex. 125) beginning on January 7th show continuous heavy weather, culminating on the 8th and 9th in a storm of unprecedented ferocity. For example, on January 8th, 4:00 A.M.: wind force 11, barometer falling rapidly (Tr. 1629). At 8:00 A.M.: wind force 10 and 11 (Tr. 1629). At 12:00 noon on the 8th: "Vessel laboring at reduced RPM's. Shipping water occasionally main deck and over hatches (Tr. 1630). At 1211: "Mountainous

WNW seas and heavy WNW swell, frequent heavy seas over the bow and sides" (Tr. 1631). "Mountainous" is the "maximum of our descriptive ability" (Tr. 1632); at 1330: "Cover on No. 2 boat ripped off by mountainous seas" (Tr. 1632); Bare steerage way was being maintained (Tr. 1632-1633); wind force 11 and 12 (Tr. 1634). At 1550: "Cover on No. 1 boat ripped and starboard running light ripped out by huge sea, Bare steerage way maintained" (Tr. 1633). The decks were continuously awash, making it impossible to take soundings (Tr. 1636). (See deck log, Ex. 125). On the 9th the storm still continued at its worst. His log continues to show winds of force 10 and 11 (Tr. 1639-1640), and "shipping heavy water on all decks." That means "the foredeck, the afterdeck and the boat deck." "It means that all those decks are awash with heavy seas" (Tr. 1640-1641). "These seas not only were huge and mountainous, but they were coming with such speed and driving force, and instead of being lengthened out they were sharp steep. The vessel just had no chance to rise over the top of them" (Tr. 1656). He was on the bridge constantly for three days (Tr. 1643). At 1617 on the 9th the entry is "stop engines; huge sea struck port side amidships; miscellaneous damage per statement attached" (Tr. 1643). We refer the Court to his vivid description of this:

> "All of a sudden, this mountainous sea—where it come from I don't know. It just was right off of the beam directly on the beam now. I saw it out of the corner of my eye. I looked up, and it was just like a huge mountain, just like a huge mountain towering above, you know, and the top 10 feet of it, I would assume 10 feet, was just beginning to break, breaking white, you know, like your big

breakers down on the beach; and just as I saw it I reached over and stopped the engines as you will notice here, 'Stopped engines,' and just as I did the whole thing came cascading down on top of the ship. It was so terrific that it just evidently—I was certain that the entire amidship house was broken loose from the ship. I have never in all my life felt anything like that; and as soon as the water started running away leaving the ship, why, I put way on the ship again with the engines and started looking at the damage, and there is a notation down here about the damage." (Tr. 1644-1645).

The notation referred to is in the log book, Exhibit 125, and reads as follows:

"1617, damage caused by a huge sea shipped on port side amidships severely damaged No. 2 and 4 lifeboats; carried away handrail on boat deck aft, also port running light; broke floodlight and various main deck to boat deck stanchions and several cracks along bulwarks amidships." (Tr. 1608-9)

That was all he could see right then. He later discovered other heavier damages, detailed on pages 1646-1650 of the Transcript.

He summed up his characterization of the storm by saying that he had sailed all over the world; had been in three other storms where ships went down, and in one of them, two ships went down, but—

"I can say without any reservation that this storm was the worst I have ever witnessed." (Tr. 1657).

The STONETOWN

At the S.O.S. Captain McMunagle, of the Canadian weather ship STONETOWN, was hove to, at Weather Station Peter (sometimes called Papa), 205 miles SW

of the PENNSYLVANIA (Tr. 1966). As an employee of the Dominion of Canada, a claimant here, he was a witness for claimants, and therefore adverse to petitioner. Yet even he, when referring to the entries in his log, "very high precipitous sea and swell" and "storm—very high, vicious seas and heavy swell—ship rolling and pitching heavily—shipping seas forward and midships", testified as follows:

> "Q. Well, isn't that description of a storm of great intensity? A. Of a bad storm and a bad sea too.
>
> "Q. Well, one of the worst you can encounter, isn't it? A. *That is as bad as you can get.*
>
> "Q. Have you ever seen on this station—you've been there two years—have you ever seen a worse sea condition than that? A. *I have seen seas as bad as that; maybe not worse.*" (Tr. 2004-2005).

And again:

> "Q. I am asking you point blank, captain—you have been on that station two years—have you ever seen a worse sea condition and a worse storm than as is described in this log of January 8? A. *I have seen as bad. I would not say I have seen worse. I have seen as bad.*" (Tr. 2005).

What more than this can any Court want, to establish "peril of the sea"? If a storm is "as bad as you can get", it *must* be a peril of the sea; otherwise, since no worse storms exist, there never could be such a peril.

The above entries are for January 8th, when the PENNSYLVANIA was still weathering the storm,—best proof of her seaworthiness. He testified that on January 9th the storm was continuing about as before (Tr. 2006) and that on this day (when the PENNSYLVANIA was

wrecked) the storm had reached its highest pitch (Tr. 2034).

As the length of a storm increases the strain on a ship, he was asked whether he had known any to last as long as this PENNSYLVANIA storm. He at first answered:

> "A. Lasting pretty near as long. I would have to go in the other log books to check." (Tr. 2006).

He later admitted that these other storms were not as long (Tr. 2029-2030, 2032).

He had been having very bad weather for several days. As early as January 6th. He had "strong gales". "Strong Northwesterly gale and very high, steep seas", which he described to be "a very bad sea" (Tr. 2007).

These conditions continued through the 9th when the PENNSYLVANIA was wrecked. Then his log entry is "whole gale—storm—very heavy, precipitous seas". And his vessel was "hove to" (Tr. 2007).

He said that the storm was over a wide area, worse near the center (Tr. 2028); and that if the PENNSYLVANIA was nearer than the STONETOWN to the center her conditions would be worse (Tr. 2028-2029). The PENNSYLVANIA *was* nearer the center, as we shall show.

Captain McMunagle received the PENNSYLVANIA's S.O.S. at 1925 GMT (10:25 A.M. ship's time), realized that life was at stake and immediate assistance needed, yet did not start for the rescue until *three hours* later (Tr. 2008). The reason for the delay was that *the*

storm and seas made it too dangerous to turn the ship around. He listed the dangers of turning around as follows:

> "A. If you are turning a vessel in a high sea and the sea is beam-on, for instance when you are on the point of your turn, she can strip herself of boats and everything else, if she shipped a big volume of water. That has been done time and again.
>
> "Q. Well, stripping her boats wouldn't be serious would it? A. That is only one of the things that can happen.
>
> "Q. What else can happen to it? A. She might lose ventilators. Some of her openings might have been damaged—the water-tight doors, for instance.
>
> "Q. Smashed in? A. Smashed in. All those things could have occurred.
>
> "Q. You mean she might have been so badly damaged that she would have taken water and foundered? A. It could happen." (Tr. 2009).

Even when he did turn around and started for the rescue he had to pour oil on the water to do so, the first time in 30 years (Tr. 2009-10). And, because of the weather he did not hold a course for the PENNSYLVANIA's position but went more to the southerly (Tr. 1969, 2017). In short, he was somewhat like Captain Maeda; he could not bring his ship onto a true course for the PENNSYLVANIA.

Although the STONETOWN was a frigate built for the North Atlantic patrol (a notoriously bad place), and although she was additionally strengthened for her duties at weather station Peter in the Pacific (Tr. 1943, 1999-2000), she suffered such material damage in the PENNSYLVANIA Storms that as soon as search was abandoned, she asked for, and received, permission to

return to her base for repairs, ahead of her scheduled return (Tr. 2021-22). Her log entry for January 15th is, "Returning to base due to heavy weather damage" (Tr. 2021).

Although the survey report of her damage was repeatedly demanded by petitioner during the trial, it was never produced. The serious nature, however, of that damage is indicated by Captain McMunagle's testimony on pages 2011-13 of the transcript. Among other things, his main deck developed a 41-inch crack; the steel breakwater was badly damaged, pulling and fracturing and tearing the angle irons from the deck. There were several cracks in the "galley flat" and other small cracks. One deck plate was buckled and the engineroom casing was fractured.

We urge the Court to read particularly his deposition from pages 2000 to 2011 of the Transcript.

In view of the foregoing testimony, his testimony, where he was flagrantly led by his counsel into saying that there was nothing unusual about the storm, must certainly be disregarded. That question and answer were as follows:

> "Q. Was there anything unusual or unanticipated about the weather conditions that existed in the month of January 1952 in the vicinity of weather station Papa? A. No." (Tr. 1993).

Testimony like that is of little merit, when weighed against what he said on cross-examination as detailed above.

Even if true, however, it would make no difference.

A storm of *this severity* does not cease to be a peril of the sea because not unusual, or not unanticipated.

> "True, it was no more than was to be expected in those waters at that time; (Philippine etc. v. Kokusai, etc., 106 F. (2d) 32, 34); they (perils of the sea) include occasional visitations of the violence of nature, like great storms, even though they are no more than should be expected." Hecht et al v. New Zealand Ins. Co., 121 F. (2d) 442.

To the same effect: The Newport News, 199 F. 968; Davison Chemical Co. v. Eastern Transp. Co., 30 F. (2d) 862, and other authorities to be cited infra.

Can anyone deny that the PENNSYLVANIA's was a "great storm"? Even if "not unusual", it was nevertheless so great as to be a peril of the sea. But, as a matter of fact, it was most unusual. It was unprecedented, as we shall show.

The KOTO MARU

The only other ship captain who gave his experience of the storm was Captain Mori of the Japanese KOTO MARU. He was an adverse witness called by the cargo claimants. At the S.O.S. he was about East by South 232 miles away heading for Vancouver (Tr. 1533, 1500, Ex. 123). He testified through an interpreter that on the evening of the 8th, he had winds of Force 10 and very high seas (Tr. 1509); that it was a *"big storm"*, though sometimes in winter "we expect the same kind of storm then" (Tr. 1512); that he did not respond to the S.O.S. because it would have been too difficult and dangerous to turn his ship around (Tr. 1532-33), and that the severity of this storm was "all the same" (Tr. 1520) as another

later one noted in his log book which showed wind Force 11 and seas "phenomenal" (Tr. 1515-16).

We submit that this adverse witness with his "big storm" and waves "phenominal", confirms, rather than refutes, the general testimony of the other captains.

THE SCIENTIFIC AND OFFICIAL RECORD EVIDENCE OF THE STORM

We now turn to the scientific and official record evidence.

It is first necessary to explain the source and accuracy of these records. They have been kept by the U. S. Government continuously since 1922, except for the war years, and the storms have been diagrammed on synoptic charts. Mr. Danielson, one of petitioner's witnesses, examined about 3,000 of them.

The United States and the Canadian Governments, by mutual arrangement, maintained various weather reporting stations, ships, in the North Pacific. One of these is Ocean Station Peter ("Papa"), manned by the frigate STONETOWN, and alternately by her relieving ships, the ST. CATHARINES and ST. STEPHEN. The ship's position is at Lat. 50 N. Long. 145 W., centered on a designated "grid", 210 square miles in area (Tr. 1946-47). Her sole function is to report the weather, and she has 4 trained meteorologists aboard for that purpose. Every 3 hours she reports weather conditions to Vancouver (Tr. 1946) for distribution to the various Government agencies, such as the Canadian Department of Transport at Toronto, and our own National Weather Records Center at Ashville, N. C.

During the winter months Ocean Station Peter has been continuously manned, except the year 1947, since 1946. The STONETOWN, as has already been observed, was the ship on that station when the PENNSYLVANIA was wrecked, and her official records are therefore most important.

These records thus kept are the only official records we have of wave heights at Ocean Station Peter.

In interpreting these official records of wave heights, it must be borne in mind that the observer records only the "significant heights". These are the average of the highest one-third of the waves. Thus a wave-record of 40 feet means only that the highest third of the waves averaged 40 feet but does not record individual waves of 50, 60, 70 feet or more. (Tr. 1438, Ex. 110, Page 6, first column.)

With this explanation, we turn to the two weather experts called by petitioner. These were Mr. Danielson, a meteorologist, and Dr. Rattray, an oceanographer. Both were well qualified. Mr. Danielson, after study at a Weather Observing School in Illinois, had forecast weather for the U. S. Army, working with Dr. Austin, one of the weather forecasters for the Normandy Invasion; had forecast for the continental Airlines, vitally dependent, of course, on his forecasts for the safety of their flights. At the time of the trial he was completing his Master's Degree in Meteorology, and was a Teaching Fellow at the University of Washington, and was also forecasting the weather for a Seattle Broadcasting Station. Storms, and especially storms in the North Pacific, are his special study (Tr. 1235-38, 1243).

Dr. Rattray is one of the outstanding men in the Science of Oceanography. In addition to his accomplishments in this special field, he has had personal experience at sea as an officer of the U. S. Navy and later during oceanographic research voyages in the North Pacific. He is an active member of the Council on Wave Research, The Engineering Foundation, University of California (Tr. 1425-1427, 1466).

The testimony of these men is long and it is unnecessary to go into it in detail. They explained that wind force alone is no measure of a storm at sea. *Waves* are the thing. To create high and dangerous waves, the wind must (1) blow at a *high velocity,* (2) for a *long time,* (3) in *one direction,* and (4) over a long "fetch", i.e., expanse of ocean over which the wind has been blowing continuously in one direction and thus builds up the waves (Tr. 1293-94, 1441-42). They explained the nature of storms and high, steep or "precipitous" breaking seas,—so dangerous to ships.

They also explained the science of "hindcasting" storms. This is the reverse of forecasting. By taking the official records gathered from the various weather reporting stations, and the official synoptic charts, they can hindcast a storm of some prior date and tell what seas it built up and their characteristics (Tr. 1441-42, 1552). Thus, by taking the official records of the STONETOWN and the other Government records, they were able to "hindcast" the storm exactly as it was at the PENNSYLVANIA's position 200 miles away (Tr. 1449-1452).

Similarly, by hindcasting from the official records, they refuted Captains Cuthbert's and Mori's testimony

that the PENNSYLVANIA storm was "usual", and showed that it exceeded every storm for 30 years past (Tr. 1300-01, 1469, 1484). But rather than their detailed testimony about the nature of storms and what creates them, it is their conclusions which this Court will be interested in.

Those conclusions, based upon a complete study of the official weather records, including those of Ocean Station Peter, were:—

1. That Storm No. 1, which the PENNSYLVANIA weathered, was itself an unusual storm, with waves of 20 feet or higher for 21 hours ("The vast majority of waves . . . are considerably lower than 12 to 15 feet and waves much higher than 20 to 25 feet are not usual anywhere"). Wind Waves at Sea H.O. Pub. No. 602 (Ex. 129, at page 22).

2. That in Storm No. 2, which sank the ship, the waves were 20 feet or higher for 51 hours; 30 feet or higher for 27 hours, and 45 feet or higher for 18 hours (Tr. 1297-98; Exh. 100).

3. These observations were made at Ocean Station Peter (the STONETOWN). But Storm No. 2 produced even higher waves at the PENNSYLVANIA's position (Tr. 1452).

4. That the waves were steep, and therefore dangerous, and were at their worst on the 9th, during the very hours the PENNSYLVANIA was in trouble (Tr. 1458-1464).

5. To be more specific:
   From 0400 G.M.T. January 9th to 0030 G.M.T. January 10th—when the ship radioed "Leaving now", a period of 20½ hours, the waves continuously exceeded 40 feet, reaching a maximum "significant height" of 50½ feet, with occasional rollers, as testified by the ships' captains, of 70 or 75 feet (Tr. 1455-56, 1565-66, 1766, 1768; Table, page 49 this brief).

6. That the storm was, as Mr. Danielson said,—"almost a classic example of the unfortunate combination of a number of required ingredients which are necessary to produce an extremely high sea over a long period of time, and, therefore, I would say that it was, probably produced an unprecedented storm from that aspect" (Tr. 1300).

7. That a search of the weather records for this area, from 1952 back to 1922, a period of 30 years (except for the war years when no records were kept) showed only *one* storm, back in 1931, that even approached this PENNSYLVANIA storm in its ability to produce high waves (Tr. 1301-02), and even it did not have waves quite as high or lasting as long (Tr. 1484).

The sum of these conclusions, all based, remember, on the official records, is that the storm which sank the PENNSYLVANIA was unprecedented and the worst on record.

And none of these records has been refuted.

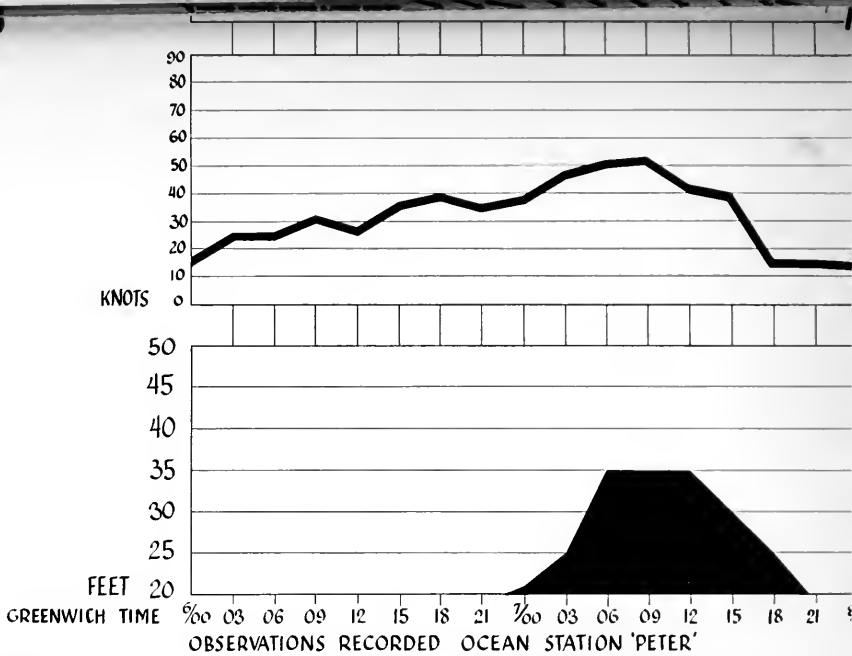
Before leaving Danielson and Rattray, we point out, to aid the Court, that:

Exh. 98 is a graph of Storm No. 1 at the STONETOWN's position and based on her official records.

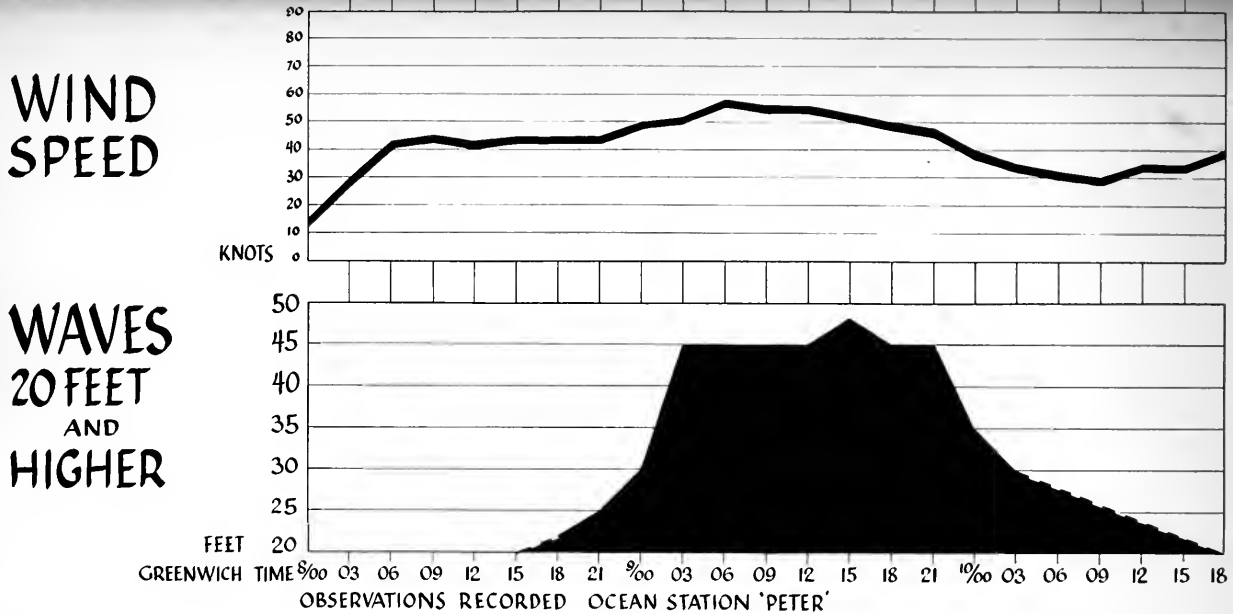
Exh. 100 is a similar graph of Storm No. 2.

Exh. 111 is a graph of the 2 storms at the PENNSYLVANIA's position, as hindcast by Dr. Rattray from the official records.

For the Court's convenience, we here reproduce these.



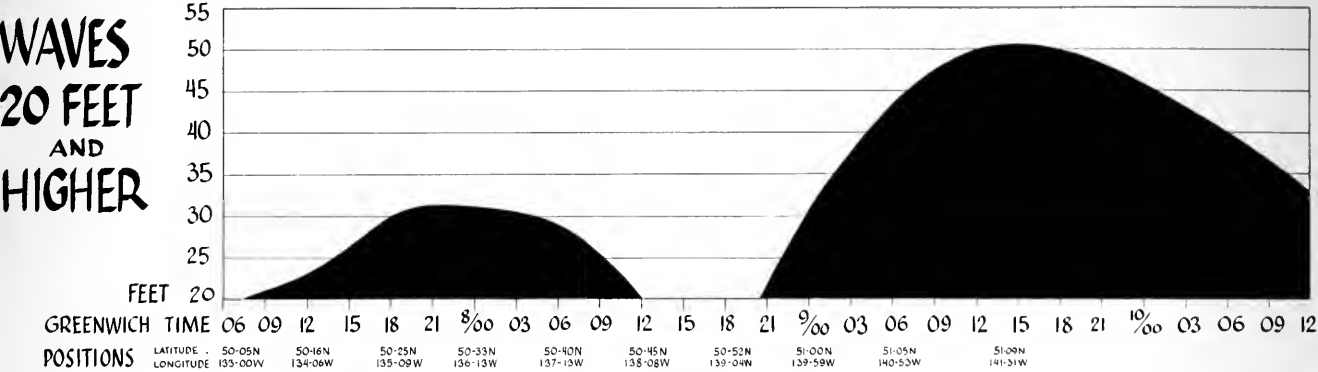
Pennsylvania Storm Jan. 6-8, 1952



Pennsylvania Storm

Jan. 8-10, 1952

HINDCASTED WAVES AT SS. PENNSYLVANIA



As already remarked, the testimony of Captains Cuthbert and Mori that the PENNSYLVANIA storm was "typical" and no worse than other storms which they cited, was thus refuted by the actual analysis of the official records of those storms by Mr. Danielson and Dr. Rattray.

(The testimony of Captain Ulstad is not to the contrary. This retired old sea-captain had a hard time keeping his mind on the subject, and kept reminiscing about Cape Horn and the Philippines. The substance of his testimony was that there are sometimes bad storms in the Pacific, which we know, but that waves above 12 feet are unusual, and that "the average, somewhere—in a good storm about 30 or 35 feet" (Tr. 2233-34). In the light of the contrary evidence, his testimony is negligible.)

Before leaving this discussion of the scientific and official evidence of the storm, we refer briefly to two matters which command attention.

The first is this:

Exh. 92 is the *official record* at Ocean Station Peter of the highest waves observed, including all waves over 30½ feet during the winter months of November, December, January and February. No record was kept in 1946, 1947 nor 1948. The record covers the period from November, 1949 through February, 1953,—the last date before the trial of this case began. This record shows that only 9 readings made at Ocean Station Peter recorded waves of 45 feet or higher, and that of those 9 readings, 7 *occurred on the day the PENNSYLVANIA was lost, the readings being on a 3-hour basis and extending for 18 consecu-*

tive hours (Ex. 92). And remember that these are only the "significant" wave heights, i.e., the average of the highest one-third.

The second is this:

When high seas are accompanied by cold temperatures, the possibility of steel cracking is increased by the cold (Tr. 211). In this connection, an examination of Exh. 91, which is the temperature record at Ocean Station Peter since 1946, shows that on January 9th, 1952, the air temperature was 32° F. or below, for a period of 15 consecutive hours, which are concurrent with the 18 consecutive hours of wave heights 45 feet and over at the STONETOWN. *At no other date* when Ocean Station Peter recorded 32° F. temperature or below were waves of 30½ feet, or greater, encountered (Ex. 92). When continuous waves of 45 feet and over are combined with these below freezing temperatures, we have a storm truly unprecedented in the North Pacific.

Now against this mass of scientific and official evidence, what did the cargo claimants produce in opposition? Since the United States is the largest claimant here, they had at their disposal all of the official agencies of the U. S. Government, the U. S. Weather Bureau, the U. S. Coast Guard, the U. S. Air Force, the U. S. Army, the U. S. Navy and the U. S. Navy Hydrographic Office,—the Weather Bureau and the Navy Hydrographic Office being particularly versed in these matters. Notwithstanding this advantage, the claimants produced nothing from any of these sources.

The only evidence they produced was the testimony

of Mr. Kinzebach. Mr. Kinzebach had to admit that he was not an oceanographer,—"I don't feel as though I am an authority on anything to do with waves or oceanography" (Tr. 2194); that he knew nothing whatever of waves,—"I know nothing about wave heights" (Tr. 2203), and his testimony was strictly limited to the number of times that the winds in the North Pacific had exceeded Beaufort Force 10, without regard to direction, duration or fetch (Tr. 2239-40, 2244). He stated frankly that his meteorological examination of the weather reords for the purpose of the trial was "merely an objective study of wind velocities" (Tr. 2248).

Mr. Ferguson properly remarked that "this witness has disqualified himself from testifying as to the waves, and so on" (Tr. 2244). And Mr. Gearin conceded "the witness is not qualified" on wave heights (Tr. 2242).

Thus we find the testimony of Mr. Danielson and Dr. Rattray relating to the height, steepness and duration of the storm waves encountered by the PENNSYLVANIA to be uncontradicted and unchallenged in any respect.

We have now discussed the evidence of the ship captains who were actually in the storm and the scientific and official evidence.

There is one more source of information,—brief though it is. Unfortunately there is no surviving witness from the PENNSYLVANIA. But we do have her radiograms. They fully confirm the other evidence of the violence and intensity of the storm. They describe the seas

as "mountainous" and "very high". The master states his intention to turn around "as soon as possible",—indicating the seas were too bad to attempt it yet. No one could "get forward to see where trouble is", and "cannot get on deck to secure" the deck load or the hatches, —obviously because of boarding seas sweeping the decks. Seas which tore loose a well-secured deckload and opened well-secured hatches with their steel pontoon covers, and damaged the steering gear.

Finally, there is the message near the end,—"only hope is for *weather* to moderate".

And what of the fact that of 45 men and the Captain—experienced seamen all—with 4 lifeboats, not one escaped? Does that not show the violence of the storm? Captain Lovejoy, the Puget Sound pilot and the last man alive to see the ship, said they were an alert and experienced crew—"it was a pleasure to be on a ship that was run like that" (Tr. 741). They had four good boats. How does it happen that not one survived? Is not the answer obvious? The extreme violence of the seas.

Certainly a very severe storm.

In the light of all this evidence, the mere sinking of this ship, pronounced by every responsible man who ever examined her to have been seaworthy, and loss of all her crew are themselves eloquent evidence of the severity of the storm.

As an aid to the Court, we have prepared a table correlating the wave heights during the PENNSYLVANIA's distress, with the times and events indicated by her radiograms.

PENNSYLVANIA STORM NO. 2

le—Showing the Prevailing Wave Heights and Duration of Waves 40 Feet and Over at Significant Times and Events

)	Events	Prevailing* Wave Height	Duration Waves Over 40 Feet	
1952				
0	Storm intensity increasing—35 foot waves increase to 40 feet	40 feet	00 hrs.	00 min.
0	Waves increase to 45 feet	45 feet	3 hrs.	00 min.
0	Waves increase to 50 feet	50 feet	7 hrs.	45 min.
5	Message to U. S. Weather Bureau reporting "MOUNTAINOUS" seas	50 feet	10 hrs.	35 min.
3	Message reporting crack port side engineroom—giving 1400 position—51° 09″ N. 141° 31″ W.	50 feet	10 hrs.	43 min.
0	Waves increase to 50½ feet	50½ ft.	11 hrs.	00 min.
7	PENNSYLVANIA had turned around steering 110°—taking water No. 1 hold—giving position at 1730	50 feet	14 hrs.	07 min.
5	New position at 1750—51°11″ N. 141°17″ W. —indicating progress toward Seattle	50 feet	14 hrs.	35 min.
5	Message reporting water No. 1 hold—cannot steer or locate trouble fwd—pumps holding in engineroom — unless steering gear fixed will require assistance — very high seas—cannot get on deck at present to secure deck load	47 feet	15 hrs.	05 min.
0	First SOS message—giving position 51°09″ N. 141°13″ W.	47 feet	15 hrs.	30 min.
5	Second SOS message—Master reporting, "TARPS FWD HATCHES STILL HOLDING USING HAND STEERING NEED ASSISTANCE"	46 feet	16 hrs.	15 min.
, 1952				
5	Steering gear fixed—rudder out of water—Master reported, "ONLY HOPE IS FOR WEATHER TO MODERATE"	45 feet	20 hrs.	04 min.
2	Master reported, "LOOKS LIKE WE HAVE TO ABANDON SHIP"	45 feet	20 hrs.	22 min.
7	Master reported, "45 PERSONS ABOARD AND 4 BOATS"	45 feet	20 hrs.	27 min.
)	Master reported, "LEAVING NOW"	45 feet	20 hrs.	30 min.

ave heights shown are "significant wave heights" being average of highest third prevailing waves (Tr. 1438). Occasional waves of 75 feet and over (Tr. 1766, 644-45).

he foregoing Table complied from: Exhibits 90, 97, 100, 111, 127; and Tr. 1452-

At the trial, counsel attempted to deprecate the radiograms by pointing out that they mentioned a wind no higher than Force 9. This overlooks two things,—

First, that estimates of wind on the Beaufort Scale are only approximations. What to one mate may be 9,

to another may be 10. In this very case, the PENNSYLVANIA's weather-reporting officer, reported wind of 45-50 miles per hour, which is a little higher than Force 9. And winds of even 9 (41-47 miles per hour) are not to be minimized. Also that the winds which built up the seas may have been previously 10 or 11, as reported by some of the other ships, but may have temporarily lessened, leaving the *seas* to continue. Also, Captain Plover, deeply concerned for the safety of his ship and intent on maneuvering her, was not spending much time nicely gauging the exact force of the wind.

Second, and most important: It is not the *wind* that wrecks a ship. It is the *waves*. At the PENNSYLVANIA they were "mountainous" and "very high".

The following quotations from "Wind Waves at Sea, Breakers and Surf", Navy Department Hydrographic Office Publication No. 602 (Exh. 129) are pertinent:

> "In short, the old rule still holds and always will, that it is the waves of a storm, not its winds, that the mariner has to fear; also that a high and heavily breaking sea is a dangerous one, whenever and wherever it is encountered." (p. 46).

And further:

> "Nautical periodicals contain repeated accounts of the damage done even to well-found ships, steam as well as sail, by the masses of water that may fall on board when such seas break; of decks swept clean of boats and houses, of bulwarks carried away, and of hatches stove in by the mere weight of water. Many a ship has been lost with all hands under such circumstances." (p. 51).

The ship captains in this case are of the same opinion.

Captain Maeda's log of the KAMIKAWA MARU, attached to his deposition, Ex. 47, for January 8th shows that in this very storm, while recording "sea tremendous", the wind was Force 9—(the same as the PENNSYLVANIA's), and on the 9th, while still recording "sea tremendous, ship laboring violently", etc., the Force was only 9 and 10—Conversely, he testified "even if the wind is strong, if the waves are small, then there is no danger" (Tr. 544).

Captain Reid said that in a typhoon "the winds were higher", but "the waves were not as high nor as consistent as we had in this particular storm" (Tr. 1829), and that "it is the seas that the wind builds up" and not the wind which damage the ship (Tr. 1839).

Captain McMunagle testified that the longer a ship has to labor in a heavy storm, the more danger to the ship (Tr. 2032).

We have remarked before that the PENNSYLVANIA was closer to the center of the storm than any other ship. This is evident from a reference to the synoptic charts of the storm for January 9, 1952.

If you plot the positions of the ships on any of the synoptic charts for January 9th, you will see that the PENNSYLVANIA was nearer the "eye" of the storm than any of them.

Take, for example, the chart for 1830 GMT on the 9th (identified by its stamp 091830 in the corner, in-

cluded in Exh. 95). This was close to the time of the first S.O.S.

At the first S.O.S., these were the ships' positions:

PENNSYLVANIA—Lat. 51.09 N, Long. 141.13 W —Exh. 127.

SHOOTING STAR—200 miles WSW from PENNSYLVANIA—(Tr. 1775).

KAMIKAWA MARU — 100 miles SW of the PENNSYLVANIA—(Tr. 527).

STONETOWN—205 miles SWly of the PENNSYLVANIA—(Tr. 1966, 1968).

CYGNET III—Lat. 49.10 N, Long. 142.35 W—(Position given in radiogram Exh. 127).

KOTOH MARU—232 miles S by E of PENNSYLVANIA—(Tr. 1533, 1506).

Plot these on a synoptic chart for January 9th, and it is apparent that the PENNSYLVANIA was further North, and nearer the center of the storm than any of them, and therefore, as Captain McMunagle said, in a more dangerous position (Tr. 2028-29).

AUTHORITIES—ON PERILS OF THE SEA

We do not believe that this Admiralty Court, with its experience, needs many authorities on perils of the sea, or, as the statute has it, "Perils, dangers and accidents of the sea" (COGSA). A few will suffice:—

> "That term (perils of the sea) may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur.' " Judge Wallace in The Warren Adams, 74 Fed. 413 (2d Cir. 1896), at p. 415.

"Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistable force overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." Judge Rogers in The Giulia, 218 Fed. 744 (2d Cir. 1914), at p. 746.

"But it is to be remembered that, in order to find peril of the sea, the losses sustained need not be extraordinary, in the sense of necessarily arising from uncommon causes. Rough seas are common incidents of a voyage, yet they are certainly sea perils. . . ." Judge Hough in the "Newport News", 199 F. 968, 971.

" . . . The peril which forms a good exception in a bill of lading means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety." Judge Hough in The Rosalia, 264 Fed. 285 (2d Cir. 1920), at p. 288.

Judge Learned Hand summarized the status of the law, and in so doing explained The Rosalia, as follows:

"The phrase, 'perils of the sea', has at times been treated as though its meaning were esoteric: Judge Hough's vivid language in The Rosalia, 2 Cir. 264 F. 285, 288, has perhaps given currency to the notion. That meant nothing more, however, than that the weather encountered must be too much for a well-found vessel to withstand. Duche v. Brocklebank, 2 Cir., 40 F. 2d 418. The standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea. That Judge Hough meant no more than this in The Rosalia, supra, is shown by his reference to the definition in The Warren Adams, 2 Cir., 74 F. 413, 415, as the equivalent of what he said. That definition was as follows: 'That term may be

defined as denoting "all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence."' It would be too much to hope that The Rosalia, supra, will not continue to be cited for more than this, but it would be gratifying if it were not." Philippine Sugar C. Agency v. Kokusai Kisan Kabushiki Kaisha, 106 F. (2d) 32 (2d Cir. 1939), at pp. 34-5.

Judge Chase, of the Second Circuit, also commented upon "Judge Hough's vivid language in The Rosalia" as follows:

"With this, we are quite in accord. This statement, however, did not add to nor detract from what had previously been a peril of the sea. One's conception of what is catastrophic may differ from that of another; but the words 'so catastrophic' could of course be replaced by colorless words like 'of such a character' without changing the legal import at all." Duche v. T. & J. Brocklebank, 40 F. (2d) 418 (2d Cir. 1930), at p. 419.

If a storm is unusually severe, *it is peril of the sea even if reasonably to be expected in those waters at that season of the year.*

"We need not resort to the somewhat rhetorical description of this storm by the officers to believe that it was one of unusual severity. *True, it was no more than was to be expected in those waters at that time;* but in some waters at some seasons, even hurricanes are not infrequent. Although this was not a hurricane, it was bad enough to damage the gear and superstructure of a seaworthy ship." Judge Learned Hand in Philippine Sugar C. Agency v. Kokusai Kisan Kabushiki Kaisha, supra, at p. 34. (Emphasis supplied)

"We may concede arguendo that they (perils of the sea) cover only 'extraordinary occurrences' (Hazard v. Insurance Company, 8 Pet. 557) but if

so, while they do not include those injuries which are the run of all voyages, *they certainly do include occasional visitations of the violence of nature, like great storms, even though these are no more than should be expected.* In England the phrase is certainly no less comprehensive." Hecht, Levis & Kahn v. New Zealand Insurance Co., 121 F. (2d) 442 (2d Cir. 1941). (Emphasis supplied).

"Libelant has laid much stress upon the statement in the opinion of the District Judge to the effect that the storm, however violent, was not so great as not to be anticipated at that season of the year. The learned judge followed this statement, however, with the statement that there was much testimony to indicate that quite unusual and unexpected damages were received by the vessel. And he concluded his opinion with the statement: 'The gale was doubtless no greater in intensity than other storms which have occurred upon the Chesapeake Bay, and yet as a result of the combined fury of wind and wave, injuries occurred that could not have been foreseen. I am satisfied that the element of catastrophe was present in the situation, against which ordinary care was of no avail.'

"It is clear from this that the District Judge found present the elements necessary to constitute a peril of the sea. And his finding is not negatived by the statement that the storm although violent, was no more violent than was to be anticipated at that season of the year. Storms of the greatest intensity are to be anticipated in certain waters at certain seasons; and, if that fact removed them from the classification of perils of the sea, that term might as well be stricken from bills of lading. *The theory that to constitute a peril of the sea a storm must be of such intensity as not to be anticipated is one which finds no support in the law.*" Judge Parker in Davison Chemical Co. v. Eastern Transp. Co., 30 F. (2d) 862, 864 (4 Circuit, 1929). (Emphasis supplied).

The Canadian cases are in accord and are even more categorical:

> " . . . it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from an irresistable force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves when such damage cannot be attributed to someone's negligence." Keystone Transports, Ltd. v. Dominion Steel & Coal Corp., Ltd., (1942) 4 D.L.R. 513 (Supreme Court of Canada).

Finally, this Court, by Judge Denman, has declared itself in accord with the foregoing principles:

> "The carrier proved a storm of several days, with very heavy weather, in which the seas crossed the decks and damaged the No. 1 hold hatch coverings so that it was possible for the salt water to enter. There was other damage to the vessel, the heavy seas aboard smashing the door to the saloon alley and breaking off the guard plates for the steam pipes on the side of the No. 3 hatches.
>
> . . . . .
>
> "We find that the sea water damage to the cargo was due to the heavy storm, a peril of the sea, which caused an opening in the hatches through which the water entered." The Wildwood, 133 F. (2d) 765, 771-772 (9th Cir.).

THE TRIAL COURT'S FINDINGS

The Trial Court's Memorandum Opinion states:

> "First to be determined is whether the PENNSYLVANIA storm was of such magnitude as to constitute a peril of the sea. I do not think it could be so considered. It is apparent from the evidence that the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific

voyages over the Great Circle route. There appeared to be nothing catastrophic about the storm. Other vessels withstood the wind and the sea, which leads to the inescapable conclusion that the PENNSYLVANIA was not seaworthy, or it too would have survived."

The Trial Court's Finding III follows this almost verbatim as follows:

> "The storm, which has been designated as the Pennsylvania storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness."

The Court nowhere reviews the evidence, and his Finding is apparently based on his premise that "all other vessels in the area withstood the wind and the seas".

That is not a valid reason for overriding the undisputed evidence of the *official records,* and the testimony of the Captains who were *in* the storm that it was the worst they had ever experienced (Captains Reid and Brown), only 2 or 3 like it in 35 years at sea (Captain Maeda), and "as bad as you can get" (Captain McMunagle) (Tr. 2004).

Furthermore, this basis for the Trial Court's Finding is untenable for several other reasons:

First, The strains and stresses and buffets that one

ship may get in a storm are very different from those of other ships in the same storm. It all depends on how she is loaded, in ballast or not, "stiff" or "tender", the direction she is headed, how the waves, or a quick succession of overpowering ones, may pour their tons of water on her, so that she has no time to rise from one before another hits her, or how some freak "mountainous" wave, like Captain Brown's, may come on her when she is not poised to receive it. As Mr. Nordstrom testified:—

> A ship . . . "is in constant motion subject to varying loads and never in the same position, pitching, in which the bow rises up and alternately drops, and the stern rises and drops meeting heavy waves, rolling and twisting around from all points. The ship's hull is subject to constant reversed stress, changing stress magnitudes and the impacts of all types so that it is what—stresses in a ship are what are called statically indeterminate . . ." (Tr. 2867). And as he said again, in speaking of the stresses on a ship,—"The combinations of seas and weather are infinite." (Tr. 2925).

It does not need this testimony—it is self-evident—that no two ships can be storm-tossed in an identical manner. The PENNSYLVANIA was as stout a ship as any. But we are reminded of the Court's remark in The Sandfield:

> "If a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, her owner is not responsible, as a carrier, for the cargo lost, upon proof that a stouter vessel would have out-lived

the storm." The Sandfield, 92 F. 663, 666 (Second Circuit).

And as that great admiralty judge, Addison Brown, said many years ago: "It was long ago held (Amies v. Stevens, 1 Strange, 128) and is laid down in Abb. Ship. † 389, as elementary law, that 'if a vessel reasonably fit for the voyage be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril.' " The Titania, 19 F. 101, 107.

A second reason why the Judge's basis for his Finding is erroneous is that it is not true that "all other vessels in the area withstood the wind and the seas". True, none of them sank. The more distant ones 700 or 800 miles away and out of the storm's violence escaped. But the closer ones like the SHOOTING STAR, the CYGNET III and the STONETOWN all received serious damage, their Captains were worried for their safety, and any one of them, if she had been the victim of some fortuitous combination of the seas, might have sunk.

A third reason is that it ignores the fact that apparently none of these other vessels was as near the center of the storm as was the PENNSYLVANIA, and therefore, according to Captain McMunagle, not in as dangerous an area of the storm.

Conclusion, Regarding the Storm

When the official records show that this was the worst storm in the North Pacific since 1922; when the official records of Ocean Station Peter show that in the

period covered there were only 9 readings recording waves of 45 feet or higher, and that of those 9, 7 recorded at 3-hour intervals, *occurred on the day the PENNSYLVANIA was lost;* when the Captains who were *in* the storm say it was the worst, or as bad as any they had ever seen; when it overcame and sank the PENNSYLVANIA,—a stout, seaworthy ship, as every man who ever examined her testified; when no life-boat escaped; when there is no contradiction of any of this evidence,—there can be only one conclusion. And that is that the Trial Judge's Finding that this storm was not a peril of the sea is clearly erroneous. Indeed, the testimony being onesided, and uncontradicted as it is, his "Finding" takes on the aspect of an erroneous conclusion rather than a finding of fact. But even if it be regarded as a finding of fact, with some evidence to support it (which we deny), it is "clearly erroneous" under the definition in the McAllister case that a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." McAllister v. U. S., 348 U.S. 19, 20, 99 L. Ed. 20, 24, 1945 A.M.C. 1999, 2001, Permanente Silverbow - Colorado, 1956 A.M.C. 695.

The PENNSYLVANIA Was Seaworthy—The Court Erred in Finding That She Was Not. Specifications of Error I, II and V.

SUMMARY

The Court erred in finding that the PENNSYLVANIA was unseaworthy. The basis for his conclusion, viz., that other ships survived the storm but she did not, was particularly erroneous; as was also his finding that the vessel had a "crack sensitiveness" "by reason of", i.e., caused by, the former crack in her deck, or at all. There was no testimony at all that this crack would *cause* "crack sensitivity".

Since the Court does not say in what respect the ship was unseaworthy at the inception of the voyage, it is difficult to know what he meant, but if he intended to find that the steering gear, or taking water in No. 1 hold, or the deck cargo coming adrift and taking the tarpaulins off the forward hatches, and No. 2 hatch being open and full of water, constituted unseaworthiness, —especially at the beginning of the voyage—he was clearly in error there too. There was no proof of it.

Although, since petitioner had proven a peril of the sea, the burden of proving unseaworthiness was on the cargo, the petitioner, though not called on to do so, affirmatively proved that the ship was seaworthy. That proof as we shall shortly show consisted in the testimony of experts who knew the ship; her successful use for eight years, five of them trans-Pacific; the fact that the officers and crew remained with the ship voyage after voyage, thus expressing confidence in her; and finally

that she passed through PENNSYLVANIA Storm No. 1 successfully, and fought PENNSYLVANIA Storm No. 2, the worst in thirty years, for many hours before she went down.

Seaworthiness is reasonable fitness for the voyage. We shall show that the ship met that requirement and that the Court erred in finding that she did not.

Argument

The findings of the Court on this subject are IV and V, and are as follows:—

"IV.

"That contributory factors responsible for the sinking of the SS PENNSYLVANIA are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that No. 2 hatch was open and full of water.

"V.

"That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-

foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all her crew and personnel aboard and all of her cargo."

The underlined words above were inserted by the Court at the instance of the petitioner. The remainder of the findings are exactly as presented by the Government.

It is difficult to know just what the findings mean because the Court does not say what *was* "the unseaworthy condition of the vessel at the inception of her voyage". All he says is that the foregoing "faults, failures, breakdowns" etc. were "factors of unseaworthiness" "culminating from the unseaworthy condition of the vessel at the inception of her voyage". That they were "contributory factors responsible for the sinking of the SS PENNSYLVANIA"; as stated in Finding IV, can hardly be denied. That they were "factors of unseaworthiness" *at the time of her sinking* is, in a sense, true too. For certainly if a vessel were to *put out from her original port* in that condition, with a crack in her side, taking water in No. 1 hold, steering gear failing, deck cargo adrift, etc., no one could argue that she was seaworthy. But the question is not whether they were factors of unseaworthiness *at the time of her sinking*. The question is: What was her condition *when she left the dock in Seattle?* On that the Court's finding is si-

lent, except to say that at that time she was "unseaworthy". It may be inferred that, by his reference to the "crack sensitiveness" of the vessel in extreme cold weather by reason of the 22-foot crack in her deck, he possibly meant that she was crack-sensitive at the inception of her voyage, and it was in that respect that she was unseaworthy. But as to the other "faults, failures, breakdowns and defects", he does not make it clear how they "culminated" from any unseaworthiness at the inception of the voyage,—or what that unseaworthiness was.

The upshot of it is that he held the vessel to be unseaworthy without being particular to say in what respect, except in the matter of the crack sensitiveness "by reason of" the former crack.

This finding is against the evidence of all the competent and qualified men who testified, and we shall show that it was clearly erroneous.

But before approaching that, we should inquire what was the *basis* or underlying reason for the Court's finding, against all the responsible evidence. The answer is found in his own Memorandum Opinion, already referred to, where he says,

> "Other vessels withstood the wind and the sea, *which leads to the inescapeable conclusion that the PENNSYLVANIA was not seaworthy, or it too would have survived.*" (Emphasis supplied).

He refers to this again obliquely in his Finding III, where he said that the storm was not a peril of the sea because "all other vessels of the area withstood the wind and the sea the sole and proximate cause of the PENNSYLVANIA's sinking being her own unseaworthiness".

Now this, as a reason for holding a ship unseaworthy, has no support whatever in the authorities. They are, in fact, directly to the contrary, as in logic they should be.

> "If a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, her owner is not responsible, as a carrier, for the cargo lost, upon proof that a stouter vessel would have outlived the storm. Ang. Carr. 173." The Sandfield, 92 F. 663, 666.

> "The evidence discloses that the storm was a severe one, and the mere fact that none of the other ships in the vicinity suffered in the same way as did the 'Arlington' does not detract from this evidence." The Arlington, 1943 A.M.C. 388, 392 (Supreme Court of Canada).

> "Suffice it to say that the fact of one vessel's ability to remain afloat under given conditions is not sufficient to raise a presumption of another vessel's unseaworthiness, if she sinks under the same conditions of wind and sea. Seaworthiness must be tested by a more precise rule and the condition of each vessel determined by known factors, not by mere prima facie parallel situations which, at most, are slightly persuasive but not at all conclusive, of the condition sought to be proved." The Carroll, 60 F. (2d) 985, 993 (D.C.D. Md. 1932).

Also, The Titania, 19 F. 101, 107, already cited.

We know of no cases that go contrary to these authorities. The reasons for refusing to base any finding of unseaworthiness on the fact that other vessels survived are obvious. They have already been referred to in this brief in discussing perils of the sea. The combinations of sea and weather are so infinite that no inference from the behavior of one vessel in a storm is appropriate re-

garding another vessel in the same storm. It would be impossible to prove the condition, design, loading and navigation of every other vessel that was in the storm. If an unfavorable inference were to be drawn, petitioner should have the right to offer detailed evidence regarding each vessel. Also, as has already been pointed out in this brief, while other vessels in the "area" were as much as 700 or 800 miles away, and out of the storm's violence, those close to the PENNSYLVANIA suffered severe damage,—damage that might have been fatal had it hit the ship in more vulnerable spots.

If the fact that only a few vessels, out of all the merchant fleets in the world, sink with all hands, raises a presumption of unseaworthiness, then every carrier in the world is an absolute insurer against total loss, since by hypothesis the only witnesses who could with certainty state the cause of the loss are dead. That would indeed be a strange way to carry out our declared National Policy of encouraging the American Merchant Marine.

The error of the trial judge seems to us the more remarkable because the cargo claimants had the *burden of proving* unseaworthiness. The petitioner having proved peril of the sea, the burden then passed to the cargo claimants to prove unseaworthiness. The Trial Court, on the flimsy basis that "other vessels withstood the wind and the sea, which leads to the inescapeable conclusion that the PENNSYLVANIA was not seaworthy, or it too would have survived" must have held that they sustained that burden. He calls it a "conclusion". As such it was clearly erroneous, not only because based on an entirely

false reason which all the courts, as shown above, have repudiated, but also because it was against the overwhelming weight of the evidence which proved the ship seaworthy. That evidence we shall now discuss.

EVIDENCE OF THE PENNSYLVANIA'S SEAWORTHINESS

The PENNSYLVANIA (ex 'Luxembourg Victory') was built at Oregon Shipyard by the United States Maritime Commission according to plans and under the supervision of the American Bureau of Shipping in 1944. Her steel met all the requirements of the Bureau. She was a Victory ship and as such was especially designed for welding, and, by reason of the experience in building the Liberty ships, embodied in her original construction all the corrective and preventive measures against cracking which had been omitted in the Liberty ships (Tr. 2737-39; 383; 1877-1878).

She was operated for a time for the Maritime Administration by Lykes Bros. Her then master testified she was a "very good" ship (Tr. 2227).

For four years prior to her purchase by petitioner she was operated trans-Pacific by Pacific Far East Line, as agent for, or under bareboat charter from the Maritime Administration. During this period her principal base port was Seattle, where Mr. Knowles was her husbanding agent and took care of her maintenance and repair (Tr. 450-452). He testified that through all this service she was a "very good ship and was one of the best that we operated" (Tr. 452). Her constant use, trans-Pacific, should be the best test of her fitness for the voyage on which she was lost on the same trade route.

She was purchased by petitioner from the Maritime Commission in February, 1951 (Ex. 3). Mr. Tucker, representative of the Maritime Administration, at the sale, testified she was "in good seaworthy condition" at that time (Tr. 748). The price was a little over one million dollars,—the "floor price" fixed by the Merchant Ship Sales Act of 1946 (50 App. USCA §§ 1735-1746) under which at least 25% of the purchase price must be paid in cash at time of purchase. Prior to and in anticipation of her acquisition, petitioner spent $79,965.00 (Tr. 157-58) in betterments.

She was renamed the PENNSYLVANIA. Her dimensions are admitted as follows: Overall length 455 ft. 3-11/32 inches; breadth 62 ft.; depth 38 ft.; gross tonnage (without deduction for engineroom space) 7,608 tons; net tonnage 4,551 tons. She was a single screw steel vessel.

Her Certificate of Registry (Exh. 5) shows that her registered length between perpendiculars was 439.1 ft. and her horsepower 8,500.

Immediately prior to her purchase by petitioner a "condition survey" of the ship was made (Exh. 2). The report of it shows that Mr. Tucker and Mr. Hare signed it for the seller, the Government, which is the largest claimant in this proceeding, Mr. Knowles for Pacific Far East Line and Mr. Brenecke for the to-be new owner,—this petitioner. All these men agreed that the ship at this time was in first class seaworthy condition (Tr. 748, 456, 328; Exh. 2).

So also did Mr. F. P. Miller, the surveyor of the

American Bureau of Shipping, who passed upon the reconditioning (Exhs. 30, 31; Tr. 399), and Commander J. E. Rivard, of the U. S. Coast Guard, who likewise passed on the reconditioning and whose entry in his dry-dock examination report, page 18, contains this entry:

> "30 January 1951—alone at Todd's, vessel floated off dock this date. Vessel seaworthy." (Exh. 50; Tr. 588).

So also did John D. Gilmour, the hull surveyor representing Lloyds Underwriters at the time of the reconditioning (Tr. 2383).

Subsequent to her purchase by petitioner she made five trans-Pacific voyages. Her log books, Exhs. 40 to 44, show that upon these voyages she encountered many instances of storm and heavy weather, all of which she survived,—the best proof of her general seaworthiness. On Voyage 5 she suffered the crack in her deck mentioned in the trial judge's Findings. It was caused by a combination of three unusual factors,—(1) heavy weather, (2) a tiny incipient crack in a pad-eye on the deck, creating a "notch", and (3) a heavy deckload of Jap squares (large squared timbers) concentrating stress on the deck at that particular place (Tr. 211-215, 309, 1859).

The vessel turned back and came to Portland, a distance of 1500 miles, in bad weather, where the crack was fully repaired. So far from this crack being an evidence of "notch sensitivity" of the steel, or, as the Court puts it, "crack sensitiveness", the fact that it did not extend farther across the deck, is evidence of the general toughness of the steel. In fact, Mr. Williams, the cargo claimants' own witness whom they brought out from

Washington for their own special purpose, said that he made laboratory tests of a specimen of this steel taken from this very crack and found that it met all the requirements of the American Bureau of Shipping, which, be it remembered, was the designated agency selected by the Government itself to supervise the building of these ships (Tr. 1877-78). More on this crack later.

In August, 1951 (which was before this crack), the PENNSYLVANIA underwent her annual survey by the American Bureau of Shipping and the U. S. Coast Guard, the ship's officers also participating, at Tacoma and Seattle. Her hull, machinery, steering gear, hatches and all equipment were all carefully examined and proved satisfactory. Commander Hamilton and Inspector Rojeski, both of the Coast Guard, and Mr. Miller, surveyor of the American Bureau of Shipping, made these examinations and testified in court in person and declared the ship to be completely seaworthy (Tr. 670, 721, 411-414; Exhs. 13, 33, 53, 55). Petitioner's personnel who participated in the survey testified to the same effect (Tr. 170-172, 494).

The vessel having now completed five trans-Pacific voyages successfully, was drydocked at Todd's Drydock in Seattle in December, 1951, for her annual drydock inspection. She was there examined by Commanders Hamilton and Brown of the Coast Guard; Mr. Wilson of the American Bureau at Seattle, Mr. Brenecke, petitioner's assistant port engineer, by Mr. Matthews, the ship's chief engineer for the five voyages, by Mr. Reid, the ship's chief engineer for Voyage 6 (Mr. Matthews having laid off for private reasons) and by Mr. Good-

rich, superintendent at Todds. All these men found her in good condition; and so testified in court, except, of course, Mr. Reid, who was lost with the ship (Tr. 670-76, 724-735, 750-763, 331-33, 1717-1721, 347-49, 2817-2820; Exhs. 54, 57). This was only fifteen days before the ship's departure from Seattle on the fatal Voyage 6.

After this she proceeded to Vancouver, B. C., where she loaded a cargo of barley in all of her holds under the strict supervision of the Port Warden and in accordance with the Canadian Grain Regulations, which are notoriously exacting. There is no criticism of this loading.

She then returned to Seattle and there completed her loading. All of this Seattle cargo was Army cargo, carried under an amended shipping contract known as MST-60 (Exh. 132B). The vessel carried a very small deckload, only some acid in carboys and some acetylene tanks stowed forward, and 18 small 2-wheel trailers stowed on the starboard deck by No. 2 and No. 3 hatches, and 2, 7-ton, trucks, one on the square of No. 4 hatch, and the other on the starboard side of the hatch. The whole deck cargo weighed only 67 long tons (Exhs. 81, 81A, 83, 187). Pursuant to the shipping contract, all of this cargo, both under and on deck, was loaded by the Army's own contracting stevedore and the loading and stowage were approved by the ship's master and mate, by the super-cargos both for the Army and the petitioner and by two surveyors for the San Francisco Board of Marine Underwriters (Exh. 132B; Tr. 1065-1094, 1132-1141, 1173-1200, 1728-1734, 2679-2692, 973-1017, 2133).

The vessel left Seattle shortly after 8 A.M. January 5th in good trim and not loaded to her winter marks (Exh. 27; Tr. 1092). She was piloted from Seattle to the pilot station by Captain Lovejoy, a regular licensed Puget Sound Pilot. The distance was some sixty odd miles and Captain Lovejoy testified the ship behaved perfectly during this run (Tr. 740). Captain Lovejoy was the last man alive to see her. She was bound for Yokohama via the customary Composite Great Circle Route.

She passed through Storm No. 1 and withstood Storm No. 2, the worst in 30 years, for 21 hours before she went down, during which she executed the most dangerous maneuver a ship can make in such a storm—turning around.

What does this record indicate as to the vessel's seaworthiness?

First: We have the testimony of the many expert men who examined her and whose responsibility it was.

Second: We have her successful use,—her navigation of the seas for eight years, the last 5 years on this very trans-Pacific route where she was wrecked. We know that on her five trans-Pacific voyages under ownership of the petitioner she encountered many storms and survived them all.

Third: We add the fact that as shown by the crew lists, on the first page of each log book in evidence, many of the officers and some the crew remained with the ship through all five voyages,

evidencing their faith as seamen in her seaworthiness.

Fourth: We have the evidence that she passed through Pennsylvania Storm No. 1 successfully and battled Pennsylvania Storm No. 2—the worst storm in 30 years—through the night of January 8th and well into the afternoon of January 9th. She even survived for more than six hours the damage she incurred in the dangerous maneuver of turning around before, at last, under the repeated blows of the elements, she went down.

Let us take the first:

Commencing with her condition survey in February, 1951, and ending with her drydocking in December, 1951, she was examined by at least eighteen expert men, all of whom pronounced her seaworthy. They are:

E. D. Tucker, representing the Government at the condition survey (Tr. 746-48; Exh. 2).

Roy E. Knowles, representing Pacific Far East Line, which as charterer was turning the ship back to the Government (Tr. 455-56; Exh. 2).

F. P. Miller, surveyor for the American Bureau of Shipping at the condition survey, and who surveyed the ship again at her annual inspection in August, 1951 (Tr. 399, 406-415; Exhs. 31 and 33).

Commander Rivard of the U. S. Coast Guard, who supervised the reconditioning repairs (Tr. 600-601, 614, 623; Exhs. 49-52).

John D. Gilmour, hull surveyor representing Lloyds at the time of reconditioning (Tr. 2383).

Lt. Rojeski of the U. S. Coast Guard who surveyed the ship's hull and equipment at the annual survey in August, 1951 (Tr. 700-721; Exh. 55).

Commander Hamilton of the U. S. Coast Guard, who also participated in the annual inspection August, 1951, and again at the drydock examination in December, 1951 (Tr. 656-676; Exhs. 53, 54).

Harold R. Pratt of the American Bureau of Shipping (Tr. 896-97; Exh. 66).

Captain Endreson of the U. S. Coast Guard (Tr. 869, 875-876; Exhs. 63-65).

Captain D. L. Bennett of the U. S. Salvage Association (Tr. 1130-31; Exh. 85).

Kenneth Webb of Lloyds of London (Tr. 1123; Exh. 84).

K. C. Sloan, of Albina Engine & Machine Works (Tr. 849; Exh. 10).

(The survey and inspection of these last five pertain only to the repair of the deck crack.)

J. D. Wilson of the American Bureau of Shipping at Seattle, who examined the ship at her final drydock inspection (Tr. 763; Exh. 57).

James F. Goodrich, Superintendent of Todds Drydock, who also examined the vessel then (Tr. 2818-21).

Besides these men, none of whom was employed by or was affiliated with petitioner, the following testified:—

L. A. Vallet, acting Marine Superintendent for the petitioner (Tr. 143-45, 177, 224-25, 266-69).

H. R. Brenecke, Assistant Port Engineer of petitioner (Tr. 328-334).

Captain Joe Bishop who was chief officer on two voyages and master on a third (Tr. 485, 487, 489, 491).

C. E. Matthews, chief engineer of the PENNSYLVANIA for five voyages (Tr. 336, 338-339, 342, 347-349, 379-380).

All of these men, eighteen in number, all experts and all of whom knew the ship, testified that she was seaworthy.

In connection with this testimony we hope it will not be deemed presumptuous if we remind this Court of the functions of the Coast Guard and the American Bureau of Shipping and their peculiar responsibilities. They are in a sense trustees for the safety of life and property at sea, and are by statute the agencies designated by our Government to carry out these duties.

The inspection of vessels by the U. S. Coast Guard is described in 46 USCA § 391, as follows:

> "*Hulls and equipments; exemption of vessels; enforcement of requirements.* The Coast Guard shall, once in every year, at least, carefully inspect the hull of each steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she

is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables, and other things are faithfully complied with; and if it deems it expedient may direct the vessel to be put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment. . . . As amended 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097."

The designation of American Bureau of Shipping as the official classification society for vessels owned by the United States is in 46 USCA § 881:

"*Classification of vessels by American Bureau of Shipping.* For the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus, and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends. . . ."

As the court said in The Zarembo,—

" . . . It would be difficult to suggest more competent persons to make such inspections than the surveyors of the American Bureau of Shipping, the United States Government Inspectors of the Department of Commerce, the Port Engineer and Marine Superintendent of the claimant, and the officers of the ship itself. . . ." The Zarembo, 44 F. Supp. 915, at p. 919 (E.D.N.Y. 1942), affirmed 136 F. 2d 320; cert. den. 320 U.S. 804.

It should be noted also that all of these men appeared in court and testified in person. We did not merely submit their certificates. We subjected them to cross-examination.

In addition to all the foregoing experts who actually saw the ship, the Court heard the testimony of Mr. D. P. Brown and Captain Carl J. Nordstrom. Neither of these men saw the ship, but they knew her records and they testified unreservedly that in their opinion the ship was entirely seaworthy. We shall discuss their testimony later. Both these men have eminent qualifications. Mr. Brown is Senior Vice-President and Technical Manager of the American Bureau of Shipping and a member of the Ship Structure Committee appointed by the Secretary of the Treasury and so often referred to in the testimony. Captain Nordstrom is a naval architect of wide experience.

Second: In addition to the testimony of all these men, we have the evidence of the vessel's actual use for eight years. There is no better test of the fitness of anything, be it a ship, an aeroplane, a locomotive, a drawbridge or anything else, than to *use* it. If it successfully stands the test of use it is good. We therefore turn to the use that was made of the PENNSYLVANIA.

After she was built in 1944 she was operated for a time by Lykes Brothers. She ran on a reef on her second voyage but the damage was not serious, her tank tops were not punctured, she got off without tugs and was completely repaired. After her service with the Lykes Brothers she was bareboat chartered by the Gov-

ernment to the Pacific Far East Line, and operated out of Seattle trans-Pacific on the very trade route in which petitioner subsequently operated her. She successfully navigated under all trans-Pacific conditions and at all seasons for four years, and during all that time, as Mr. Knowles, her agent at Seattle, testified, was a "very good ship and was one of the best we operated" (Tr. 452). After she was purchased by petitioner in February, 1951, she made five trans-Pacific voyages and her log books show that on these she encountered many storms and heavy weather, all of which she successfully withstood (Exhs. 40-44). It is true that on Voyage 5 she sustained the deck crack due to the combination of factors which has been explained, but she returned to port without any difficulty, had the crack repaired and resumed and completed her voyage, all the way across the Pacific and back without further incident.

Third: The fact that the ship's officers and many of the crew remained with the ship voyage after voyage, as shown by her log books, is evidence of the belief of these men in the seaworthiness of the ship; and since these are seamen, expert in ships, their belief, thus evidenced, is evidence of the seaworthiness itself. Nobody can know a ship better than the men on her. "Know Your Own Ship" is the title of a well-known manual.

Finally, her seaworthiness is proven by her behavior in the storms. She passed through PENNSYLVANIA storm No. 1 successfully, which storm was itself unusual, with waves of 20 feet or higher, for a period of over 21 hours, including 10 hours with waves of over 30

feet. But more important, is the long and gallant battle she put up against PENNSYLVANIA Storm No. 2, which she entered on the evening of January 8th, and successfully withstood until half past three in the afternoon of the 9th.

There is one feature of her battle which we call to the Court's attention because it negatives unseaworthiness, and places the loss clearly where it belongs,—on the storm. We refer to the damage inflicted by the seas on the ship in the *vulnerable maneuver of turning around in those dangerous seas.*

The first message from the ship announcing the crack, expresses no particular concern, and does not send an S.O.S. The next message continues in the same vein and says "will turn around as soon as possible and proceed Seattle" (Exh. 108). The seventh message, in the sequence listed, sent some three hours later, said "endeavoring to steer course of 110°, can't steer at present, taking water Nr one hold and engine room" (Exh. 127). Since his previous course on the composite Great Circle Route would be about 290°, we know from this course of 110°, that he had carried out his previous expressed intention of turning around and heading for Seattle. The extreme dangers of such a turn in those seas has been described by cargo claimants' own witness, Captain McMunagle, in his testimony already quoted (Br. 30). He said she might strip herself of everything; lose her ventilators; damage her openings, — water-tight doors, for instance—; have them smashed in; and generally be so badly damaged she could take water and founder (Tr. 2009).

He supplemented that testimony with this:

Asked whether, in a storm, it would not be more difficult to turn a loaded cargo ship like the PENNSYLVANIA than a smaller powerful frigate like the STONETOWN, he said:

> "A. I don't know if it would make it any more difficult, but it would not be nice. I have had some experience turning a ten thousand ton ship around too.
>
> Q. What?
>
> A. In turning a ship of ten thousand tons. I didn't like it, but she went around.
>
> Q. It was dangerous, though, wasn't it?
>
> A. Dangerous, yes. Any ship is dangerous when she is turned like that.
>
> Q. In seas like that? A. In seas like that." (Tr. 2011).

Similarly Captain Brown of the CYGNET III testified to the dangers of making such a turn:

> "A. Well, you have your ship going as slow as possible, and you watch the series—your waves come in a series like, during a storm of this nature it might be any period of time the wind will be terrific, the seas exceptionally more severe. Then maybe for five or ten minutes you will get a lull, and then pretty soon she will pick up again and be right back to its original severity. Well, you wait for a lull and the—I don't know how to describe it—at the proper time to change course, you know, when the seas are just right." (Tr. 1642).

Captain Reid of the SHOOTING STAR referred to the same dangers. Asked if he would not have turned back to the nearest port if his ship suffered major damage, he said:

> "A. Yes, if I could have come around. A lot of

times when you are in a storm of that intensity you cannot get around." (Tr. 1813-14).

Now the very radiogram, quoted above, (seventh in the series of exhibit 126) stating that the PENNSYLVANIA was "endeavoring to steer course of 110°" shows that she had turned completely around from her previous course of about 290°, but also shows that the ship, previously unscathed except for the crack, had become seriously damaged. She was taking water in No. 1 hold, which would put her down by the head, and she was having some trouble with her steering gear. The clear implication is that she suffered this during the turn. From then on, her condition grew progressively worse until she foundered.

The fact that she was able to turn at all in those seas, is evidence of her general seaworthiness; and the fact that she finally sank, after many hours, apparently from damage which had its inception in the turn and grew worse, is no proof of unseaworthiness; but is rather confirmation of what Captain McMunagle, as a seaman told us,—that even the stoutest ship may be wrecked in such circumstances. Remember that neither he nor Captain Maeda was able to turn his ship around for more than three hours after the S.O.S. Captain McMunagle, during those hours, did not even dare attempt it.

In short, here we have the best evidence in the world that it was not any unseaworthiness which sank the PENNSYLVANIA, but rather it was the "vicious" seas sweeping her decks and pounding her while in the most vulnerable and dangerous position in which a ship can get.

Of course, the act of Captain Plover in turning around was an act in the navigation of the ship for which petitioner would not be liable under the exemption accorded in both COGSA and the Canadian Act that the ship-owner is not liable for an "act, neglect or default of the master . . . in the navigation or in the management of the ship". 46 USCA § 1304(2)(a).

Having proved the general seaworthiness of the ship, we now turn to the Trial Court's finding about

"CRACK SENSITIVENESS" "BY REASON OF" THE FORMER 22 FOOT CRACK IN THE DECK

Since the Trial Court's finding has laid special emphasis on this, we single it out for special comment.

But before doing so, we must say to this Court, at the outset, that we think "crack sensitiveness" has very little to do with the case. It was not the cause of the loss of the PENNSYLVANIA. Its only possible relevancy would pertain to the 14 foot crack in the vessel's side. But it was not that crack which sank the ship. The crack did not propagate. It stopped. The ship did not break in two. The crack only extended four feet below the water line, and the only leakage from the crack was in to the engine room, and there the pumps were controlling the water. The Master was never worried about the crack sufficiently to send out an S.O.S. The S.O.S. came later. The real thing that sank the ship was not the crack, but apparently was the foundering because of the water in No. 1 and 2 holds.

Neverthless, since so much has been made of this matter of crack sensitiveness, we shall now discuss it.

The Trial Court's Finding, V, says that "the crack sensitiveness of the vessel to extreme cold weather *by reason of* a former 22 foot crack in her deck occurring on her previous Voyage 5, which crack was fully repaired" was a factor of unseaworthiness "culminating from the unseaworthy condition of the vessel at the inception of her voyage". (Italics supplied.)

First we shall say a word about crack sensitiveness generally. The term usually used, and appearing throughout the testimony, is "notch sensitivity", which means that if steel is going to crack at all, the crack will almost invariably start at a "notch" in the steel. By a notch is meant any angle. Such, for example, as the square corner of a hatch. The same phenomenon may be observed when you tear a piece of paper. The tear will start where you first create a little tear or notch or angle in the edge of the paper. It is for this reason that in ship construction such acute angles are, as far as possible, avoided.

Notch sensitivity does not mean that steel is bad. It means that notches are the incipient causes or probable places where cracks may start. The emphasis is on the notch.

In this sense all steel ships are notch sensitive. The sensitivity is more apparent in welded ships than in rivetted ships because in welded ships the steel plates are welded into one continuous fabric of steel so that when a crack starts, it may continue through the fabric for some distance without interruption, whereas in a

rivetted ship each plate is a separate unit and the crack usually stops when it reaches the edge of that unit.

When the PENNSYLVANIA was built by the Maritime Commission, it, like all the other Victory ships, was built under the supervision of the American Bureau of Shipping, and the Bureau constantly tested the steel from the different mills to see that it met all the standard requirements (Tr. 2739). The PENNSYLVANIA was no different from the other Victory ships in this respect. If the Court is going to condemn her for quality of steel, it will have to condemn the whole fleet of Victory ships, —a large part of our merchant marine.

Not only do we know, from these American Bureau tests, that the PENNSYLVANIA steel met all the requirements, but we have further concrete, positive proof from cargo claimants' own witness that it did. We refer to the testimony of Mr. Williams, the Government's expert on steel, brought out from the Government laboratories in Washington, especially to testify in this case. He had with him a sample of the very steel taken from the PENNSYLVANIA's deck where she cracked. This sample, according to routine practice, had been sent by the Albina Engine & Machine Works' repair yard back to the Government laboratories in Washington for testing. This was done on all ships where major cracks appeared It was thus that Mr. Williams obtained the sample. He testified several times that this specimen of steel met all the standard requirements at that time.

For example,—

"A. We found that the tensile properties as

measured with a standard .505-inch-diameter specimen were better than the requirements in effect at the time this ship was built." (Tr. 1859).

Again,—

"I believe it is a representative sample of the steels used at that time in ship construction." (Tr. 1869).

Again,—

"It is a sample—one sample out of the many plates in the ship. It conformed to the specification requirements in effect at the time that ship was built, and I believe it may be assumed that many other plates in the ship were very similar in properties to this plate." (Tr. 1875).

Again,—

"A. What I meant was that this plate was of average quality compared to plates used at that time." (Tr. 1877).

And again,—

"Q. Well, then, I take it your answer meant that this steel that you examined met the American Bureau of Shipping requirements as they existed at that time; is that what you meant?

A. That is correct. The requirements included only the tensile and the bend test . . ." (Tr. 1878).

It is thus quite apparent that the PENNSYLVANIA steel was no more "crack sensitive" than the steel of any other ship. To penalize a shipowner for unseaworthiness in the steel of his ship when that steel met every requirement laid down by the American Bureau of Shipping and the Government itself, and was no different from the steel of the whole fleet of Victory ships in the American Merchant Marine, would certainly be

going very far indeed; especially when it is remembered that seaworthiness is not necessarily perfection, but merely reasonable fitness for the service.

Nor must it be overlooked that new plates were inserted; and this crack was fully repaired. Even the Court's findings conceded that. The repair was made at the Albina's Yard, a shipyard of fifty years' experience, and was supervised not only by the petitioner's personal staff, but by the Albina superintendent and foreman, by the American Bureau's surveyor, Mr. Pratt, by Captain Endreson, of the U. S. Coast Guard, by Captain Bennett, representing the U. S. Salvage Association, and Mr. Webb, representing Lloyds of London. All of these men testified personally that the repairs were well and completely done and that the ship was as good as she was before. In fact, Mr. Vallet testified that she was better than before because the incipient "notch" at the padeye which started the crack had been removed (Tr. 215).

The strongest proof of the adequacy of this repair is the fact that the crack never opened again, nor gave any trouble of any kind, although the ship went all the way across the Pacific and back on Voyage 5; and even in the disastrous and fatal storm when the ship was being battered to pieces, this part of the ship remained intact. The radiograms mentioned no trouble at this point at all.

Finally, we come to what seems to us a strange misconception on the part of the trial judge. He says that the ship was crack sensitive "by reason of" this former

deck crack. This is entirely against reason and against the evidence. In fact, there is *no* evidence to support it. This deck crack could not *cause* "crack sensitiveness" in the ship. Even while still unrepaired, it could not affect any other part of the ship outside of the immediate "girth area" of the crack. (The girth is any space extending around the girth of the ship and about 6 or 8 feet fore and aft, of the point in question,—in this case the crack.) Other parts of the ship, beyond this girth, did not even feel the effect of this crack, though still unrepaired (Tr. 2764, 2780-82, 306). And even in the girth area itself, any effects existing while the crack was still open would disappear when the crack was repaired (Tr. 2803-04).

But further than this, the crack could not set up or *cause* any crack sensitivity even in its own immediate neighborhood. If anything, the crack would *relieve* any tension that might have existed in the deck plates. That, it seems to us, is obvious even to a layman. The deck would not crack unless *tension induced* it. When the crack occurred that tension would be *relieved*. As Mr. Vallet testified in regard to welding repairs: "In fact, that acts as a stress relief. It relieves the stress." (Tr. 265). Cf. Nordstrom to same effect (Tr. 2894-95, 2922-23).

This whole idea of crack sensitiveness occurring "by reason of" the 22-foot deck crack is immaterial to the case for still another reason. The only crack that appeared on the fatal voyage, the one 14 feet down on the port side in the way of the engineroom between Frames 93 and 94, is so far removed from the earlier 22-foot crack in the deck that the two are utterly disconnected.

All the competent men that testified said that there could be no possible connection between the two (Tr. 2804, 2884, 299-300). The crack between Frames 93 and 94 was 62 feet athwartships and 60 feet aft of the deck crack. The distance between the two, diagonally across the ship, was 90 feet (Tr. 299). And in addition, the crack in the port side of the ship was separated and isolated from the whole deck of the ship, including, of course, the place where the 22-foot crack had been, by a crack-arresting gunnel bar (Tr. 300, 275, 2443). It hardly needs the testimony of the expert witnesses like D. P. Brown, Captain Nordstrom, Mr. Vallet and others to establish the obvious fact that this was too far away, and too isolated, for any hypothetical "crack sensitiveness" between Frames 93 and 94, to have existed "by reason of", i.e., caused by the deck crack.

Finally, could the deck crack, occurring in November, 1951, create a "crack-sensitivity" in another part of the ship so soon as January, 1952? To ask that, is to answer it.

The finding that the vessel had a crack sensitiveness "by reason of" the former 22-foot crack was drafted by the Government's counsel. The Trial Court must have adopted it without due consideration of its meaning. There is *no evidence whatever* to support it.

In support of the claim that the vessel was "notch sensitive" or "crack sensitive" or subject to "brittle fracture" (they all mean the same thing), the cargo claimants relied almost entirely on the witness, Mr. Hechtman.

Now the interesting thing is that Mr. Hechtman had an entirely different theory from the Court's. Mr. Hechtman thought that the vessel might be or "could be" subject to brittle fracture, not "by reason of" the 22-foot crack, as the Court said, but because of an assumed slight "hog" in the vessel. The Court evidently paid no attention to this, since he does not mention it. And since it is only the Court, from which we are appealing, we are tempted to do as he did and ignore Mr. Hechtman. But Mr. Hechtman was the cargo claimants' chief reliance. So we shall discuss his testimony.

In the first place, Mr. Hechtman's qualifications are questionable. He is not a naval architect, has never designed a ship, or had any occasion to consider the stresses and strains involved in ship construction (Tr. 2589-90). Never before this case has he had occasion to study how damage in one area of a ship might affect it in another. Except when he did some work for Dravo, his work has been entirely that of research (Tr. 2590). Never before has he made any study of the effects, if any, of a vessel grounding (Tr. 2592). Never has he surveyed a ship for a hog. Never has he examined a large size vessel in drydock (Tr. 2599-2600).

These are the limitations on his qualifications. The limitations on his evidence are even more pronounced. His whole theory was based on an assumed and false hypothesis, viz., that the vessel was hogged, sufficiently to put a strain on her hull and deck. A "hog" in a vessel, as this Court knows, is when the bottom is bent or curved upward amidships. It may be a mere "dishing",

affecting only the bottom, or, in more extreme cases, the whole hull.

The assumption that the vessel was hogged, so as to strain the hull, or hogged at all, for that matter, is not true. The hypothesis was false. But based upon it, Mr. Hechtman reasoned thus:

1. The vessel was hogged.
2. Sufficiently to put a strain on the whole hull and deck.
3. This hog was not part of the original construction. (For if so, there would have been no strain.)
4. It was the result of grounding on a reef near the Fiji Islands.
5. This put a permanent hog in the vessel, and produced a strain.
6. This produced "strain-aging".
7. This in turn produced notch sensitivity, or as he called it, brittle fracture.

The hypothesis is false.

It is based on this statement in the Report of Special Survey No. 1, made at San Francisco January 12, 1949, Report No. 8785 (included in Exh. 147):

> "The wavy condition of the bottom as outlined in Los Angeles Report No. 3079, dated May 6, 1948 was re-examined at this time and is considered to be very slight and of no consequence. In the opinion of the undersigned, the small amount of hogging which is present is the result of the original construction of the vessel and does not affect seaworthiness in any way."

On this we make these observations:

1. It was mere hearsay. It was not properly in evidence at all. The surveyors who signed it were not produced. If they had been subjected to cross-examination, they probably would have said the "small amount of hogging" is a mere supplemental repetition of the "wavy condition of the bottom" mentioned in the preceding sentence. As confirmation of this use of terms, compare Mr. D. P. Brown's statement that in experimental tests to create a "hogging condition", "It was the same pattern as this waviness." (Tr. 2754).

Also, since these surveyors were trained, competent men, who *saw* the ship and were the ones who noted the condition, they would probably have testified that they knew what they were talking about when they attributed the "small amount of hogging" to the original construction.

2. If this alleged hog was of a character to strain or distort the hull, and induce brittle fracture, would these two competent surveyors have said it was "small" and did "not affect seaworthiness in any way"? They were the ones who ought to know.

3. It is a necessary link in Mr. Hechtman's reasoning that the ship became hogged when she went over the Fiji Island reef. Yet the surveyor, Mr. Mattson, who in Report 8785 mentions the "small amount of hogging", is the very same surveyor who some years before surveyed the damage repairs after the Fiji stranding. Report No. 7618 (Exh. 147). And *he makes no mention of any hog at all.*

4. Claimants' Exh. 147 is a compilation of all the American Bureau's survey reports on this ship from September 30, 1944 (the Fiji Island grounding repairs), to January 31, 1951. During this period she was surveyed on drydock sixteen times. Except the Special Survey Report 8785, which mentions the "small amount of hogging", *not one of these other fifteen reports mentions such a thing at all.* And neither did the survey of December 21-22, 1951, the one just before she sailed (Exh. 57). (It is not included in Exh. 147.) So there were *seventeen* drydock surveys, which never mentioned a hog.

5. Besides all these A.B.S. surveyors who failed to see any hog, the following actually testified in court that they had examined the ship on drydock, and that there *was no hog.* Commander Hamilton (Tr. 694); Surveyor Wilson (Tr. 764); Mr. Goodrich (Tr. 2819); Mr. Brenecke (Tr. 2724); Chief Engineer Matthews (Tr. 2829-30); Mr. Sanderson (Tr. 952). Many of these examined her as late as December, 1951. In addition, Mr. Gilmour, claimants' own expert witness (on another question), and whom they vouched for, said that the ship had no hog (Tr. 2379-80).

6. It is essential to Mr. Hechtman's chain of reasoning that the alleged "small amount of hogging" be caused by grounding, and not be a part of the original construction of the ship. For *if* the latter, there could be no strain. The surveyors who noted it, and who should know, if anybody, said it was part of the original construction. In an attempt to disprove this, claimants referred back to some testimony given earlier in the

case by Mr. Miller, A.B.S. surveyor, who was the A.B.S. representative at the Oregon Shipbuilding Co.'s yard when the PENNSYLVANIA, along with a lot of other Victories, was being built. His duties were "To see that the vessels maintained the standards that were set down by the classification society by whom I am employed." (Tr. 383). Early in the case, before Mr. Hechtman's theory came out in the open, Mr. Miller was somewhat casually asked on cross-examination whether he was at the Yard when the "Luxembourg Victory" (PENNSYLVANIA) was launched. This testimony followed:

> "A. That is right, sir.
>
> Q. And there was no hog in the construction of the vessel?
>
> A. What do you mean, 'hog'?
>
> Q. This way (illustrating)?
>
> A. No, there was none. At the time she was launched, as far as inspection, there was no noted hog. I don't think there was any." (Tr. 418).

It is from this brief passage that claimants asked Mr. Hechtman to *assume* that there *was no hog* in the original construction.

Comment:

A. Miller's duties, as he testified, were to see to it generally that the fleet of ships being constructed "maintained the standards that were set down by the Classification Society". He was not inspecting each ship with the nicety of a Special Survey to determine a slight hog.

B. Even if the ship had a small hog, not affecting her seaworthiness, she would still meet the required standards, and he would not have noted it.

C. A ship might well have a small hog in her original construction which would not be observable at all on the launching ways—yet might show up later, when the ship's keel *rested on the keel blocks* of a dry-dock.

D. Finally, Miller never testified that there was no hog in the original construction. He said he did not "note" any. (Because there was none.) He did not "think" there was any. But if it *had* been there, he would not have "noted" it, for the same reason the other surveyors did not, i.e., of no consequence.

We have surely said enough to demonstrate the falsity of the hypothesis.

But even if there *had* been a hog, it would not have affected the hull or deck of the ship. It would have been too slight. Mr. Hechtman himself admitted that the hog he had in mind might have been so small as to be imperceptible to the naked eye (Tr. 2596-97).

Captain Nordstrom commented that the survey report of the stranding damage is bottom damage only, not affecting the hull girder (Tr. 2875-76); and, referring to the fact that the ship came back under her own power, pointed out:

> "Had the hull been buckled or distorted at all, he wouldn't have been able to turn the engines over, let alone run full speed ahead, because the shaft alley goes through that area." (Tr. 2876).

Mr. Hechtman's testimony was entirely speculative, based upon "possibilities".

He could not deny that a mere "dishing" of the ship's bottom might create the false impression of a hog (Tr. 2598-99); the hog he had in mind might be "so small that it would be difficult to see with the naked eye" (Tr. 2596). It might not be "perceptible" (Tr. 2597); it was "quite possible" that less than 50 feet of the ship "could have been deformed" (Tr. 2367). These are merely some examples of the speculative character of his testimony.

Asked whether the crack in the deck between Frames 72 and 74, was evidence of the hog or caused by the hog, he testified:—

> "A. It could be evidence of the hog and could be caused by the hog.
> Q. In your opinion was it?
> A. In my opinion it could be, yes.
> Q. Yes. That is not an answer. In your opinion was it caused by the hog?
> A. I think I would like to stand by the answer that it could be.
> Q. That is as far as you can go?
> A. That is as far as I can honestly go." (Tr. 2603).

Having testified that damage forward at Frames 54 and 58 could set up stresses as far back as Frames 93 and 94, 85 feet away, this testimony occurred:

> "Well, is it your opinion that that was the fact, or is it a mere possibility?
> A. It is my opinion that it could have occurred.
> Q. It could be?
> A. That is right.
> Q. With the emphasis on the 'could'?
> A. That is right." (Tr. 2611-12).

Asked whether little cracks at the padeyes in a ves-

sel's deck are not normal (as later testified by D. P. Brown, Captain Nordstrom and others), he said,—"I am not qualified to judge what is the normal use of the vessel" (Tr. 2602). At one point he abandoned all of his prior reasons and said that the fact that the PENNSYLVANIA had sustained two Class I casualties (i.e., two large cracks, the last on the fatal voyage) was the *only* reason that he thought her damage was unusual (Tr. 2605). His counsel tried to straighten him out on this on re-direct, but in vain. This is what occurred:

> "Your statement of unusual damage to the PENNSYLVANIA, was that predicated solely upon the fact that this vessel sustained two Class 1 casualties?
>
> A. That is correct." (Tr. 2616).

This speculative character of his testimony is illustrated by his own summing up, when asked by his counsel whether it was his opinion that the ship was sound. He said that he had a "feeling" that there was a "possibility" that the ship went to sea with unrepaired cracks in her deck, and therefore he would have "doubts" as to her soundness." (Tr. 2587).

This, in the face of the testimony that every little deck-crack wherever discovered on close inspection was repaired (Exhs. 12, 12A, Tr. 164-167, Exh. 32, Tr. 404-5, Exh. 52, Tr. 617-619, 622-623); in the face of the testimony of Mr. D. P. Brown, Captain Nordstrom, Mr. Vallet and others, that such little cracks on the deck are normal, are peculiarly local and induced by the strains put on the deck at padeyes by cargo gear handling heavy lifts, are not evidence of notch sensitivity or brittle frac-

ture, but, on the contrary, by not propagating, indicate tough steel and do not affect seaworthiness in any way (Tr. 2744-45, 2885-86).

After Mr. Hechtman had testified, petitioner called in rebuttal Mr. D. P. Brown and Captain Nordstrom. Since the value of a witness' testimony is largely in proportion to his qualifications, we will speak briefly of these men.

Mr. Brown, after graduating from the Massachusetts Institute of Technology in Naval Architecture and Marine Engineering, and also from Harvard University, went to sea for a time for practical experience, and joined the staff of the American Bureau of Shipping in 1922. He left to gain practical experience in shipyards and returned to the Bureau in 1926. In 1932 he was placed in charge of the hull technical work of the Bureau, later became vice-president and chief surveyor, and in 1952 was elected Senior Vice-President and Technical Manager. He is the senior technical officer of the American Bureau and as such is a member of the Ship Structure Committee, so often mentioned in the testimony, appointed by the Secretary of the Treasury, and is probably the most eminent man in the United States on the subject of welded ships and their construction (Tr. 2728-29, 2733, 210). He has an international reputation.

Captain Nordstrom has had from thirty-eight to forty years' experience at designing, construction and repairs. He was with the well-known Skinner & Eddy Shipyards in Seattle, taking part in the designing of seventy-six ships. He became an independent consulting

naval architect in 1928, rebuilt vessels for the Navy at Todd Shipyards at Seattle, was promoted to captain of the Navy in 1945, was in charge of repair of ships' battle damage in Seattle during the war, and has other qualifications too numerous to mention (Tr. 2849-65).

It would be tedious to review in detail the testimony of these men, and it would be laboring the point too much. It is perhaps enough to say that they refute Mr. Hechtman's testimony entirely. Mr. Brown said there was nothing in the history of the PENNSYLVANIA to indicate any weakness (Tr. 2746); that the little deck cracks around the padeyes (they were all repaired) are not unusual (Tr. 2745) and really indicate tough steel since they did not propagate (Tr. 2744); that the surveyor's report of the small hog is of no significance (Tr. 2748); that sometimes such an appearance of a slight hog is a result of an illusion from the way the ship sits on the blocks (Tr. 2748-49); that it is inconceivable that other surveyors did not report any hog (Tr. 2749). (Remember he is the boss of all these surveyors); that the damage to the PENNSYLVANIA, as shown by her history, was not unusual; that the 22-foot deck crack would be no indication of notch sensitivity in the ship (Tr. 2743); that it would have no effect whatever in producing the subsequent crack between frames 93 and 94 (Tr. 2803-04); that even if Mr. Hechtman's hog were all true, it would not affect the ship (Tr. 2810); that the fact that the ship suffered two major cracks is of no significance, considering the circumstances under which they occurred (Tr. 2771).

Captain Nordstrom's testimony is generally to the same effect; that the little deck cracks are a common phenomenon that occur from local stiffness of the material, due to the padeyes' presence and the loads applied to them (Tr. 2885-86); that they are common to all ships and are not part of the overall stress pattern of the hull (Tr. 2886); not propagating indicates tough steel (Tr. 2886); from his examination of all A.B.S. Reports in claimants' Exh. 147, it was his opinion that the PENNSYLVANIA was not permanently damaged anywhere (Tr. 2881-82); that no hog in any proper sense was ever present (Tr. 2883); that the crack in the deck relieved the stress at that point, due to heavy weather at sea (Tr. 2922). Significant of the toughness of the steel is the fact that the crack stopped. "The ship did not break in two" (Tr. 2923).

We will not review Mr. Vallet's testimony, but it was of the same general tenor.

We feel we have perhaps labored this matter too much. It is only because claimants have relied so strongly on Mr. Hechtman that we have discussed it at all. The Court apparently paid no attention to his theory. And perhaps we should have done the same.

Further Discussion of the Trial Court's "Contributory Factors" of Unseaworthiness—Findings IV and V

Having proved the ship's general seaworthiness; having shown the fallacy of the Court's reasoning that because other ships survived the storm and the PENN-

SYLVANIA did not, she must have been unseaworthy; having disposed of "crack sensitivity", we now come to the other "contributing factors of unseaworthiness" found by the Court as having culminated from the ship's unseaworthiness at the inception of the voyage—without, we again remind this Court, saying *what* the unseaworthiness was. You cannot *infer* unseaworthiness because steering gear fails, deck cargo comes adrift, or hatches are torn loose or stove in in the worst storm in thirty years. There must be some proof. There was none.

Besides the 14-foot crack, the other "contributing factors" mentioned by the Court are these:

Sea water entering the engineroom.

Failure of steering gear.

Taking water in No. 1 hold.

Deck cargo coming adrift. Taking tarpaulins off forward hatches.

No. 2 hatch open and full of water.
(Findings IV and V)

Although none of these is proof of unseaworthiness at the inception of the voyage, considering the storm, we shall, since they are thus obliquely in the Findings, discuss them. The discussion will be in the order named First, then, as to:

SEA WATER ENTERING THE ENGINEROOM

Not much need be said on this since it is but a corollary of the 14-foot crack, which we have already dis-

cussed. If that crack, especially considering the storm, is no proof of unseaworthiness at the inception of the voyage, then a mere consequence of the crack, like this water, is not unseaworthiness either.

It is enough to add that the water entering the engineroom never gave any trouble, as indeed is readily understandable since the crack was only a *crack* terminating in a hair-line, where it stopped only four feet below the water-line (Tr. 221).

To put this beyond doubt, the radiograms themselves say of this water:

> "CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE" (Exh. 127)

and later—

> "PUMPS HOLDING IN ENGINEROOM" (Exh. 127)

and never do say the engineroom was flooded, or in trouble.

(An attempt was made by counsel to prove by the "Queen Victory's" radio log that the engineroom was *flooded*. This, however, was pure hearsay, and was objected to (Tr. 1709). It was mere radio gossip between her operator and some other ship, garbling the PENNSYLVANIA's real broadcast that she was "taking water in engineroom." How could she be "*pumping* all oil" if her engineroom was flooded? And why do none of her own messages say it was flooded?)

Next as a "contributing factor"

FAILURE OF STEERING GEAR

If the Court's "contributing factor" "culminating", etc., means that the steering gear was itself unseaworthy at the inception of the voyage, it is clearly erroneous. It is *without any proof whatever.*

The only evidence we have of steering gear "failure" is in the radiograms themselves. Of course this Court is just as able to interpret them as the trial court. Being a written record, there is no presumption in favor of the trial court's findings.

The first radiogram suggesting any steering difficulty is the 7th in the sequence previously listed. It was sent some hours after the 1st, and was as follows:

> "091730Z GMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CAN'T STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINEROOM" (Exh. 127)

In this message the designation of his course as 110 degrees shows that he had carried out his previously expressed intention of turning around and heading back to Seattle. The very fact that he was able to execute that turn in those dangerous seas is itself proof of the seaworthiness of his steering gear. It is also quite probable that he damaged it during that turn. The statement that he is "endeavoring to steer course of 110 degrees" certainly implies that he had *some* method of steering and was using it. This being so, the further "can't steer at present" cannot mean that he could not steer at all, but only that he was having difficulty holding that course, either because of having to resort to hand steering gear,

or because of the tremendous seas—just as Captain Maeda and Captain McMunagle couldn't steer the desired course either.

The next pertinent message is No. 9 in the sequence previously listed. This message, sent almost an hour later, stating "down by head, cannot steer . . . if we cannot fix steering gear will require assistance", means that his steering is handicapped by his ship being down by the head and by some failure in his regular gear; but does not mean, any more than the first message did, that he could not steer at all, by use of his hand steering gear. This is confirmed in the later message, picked up by the "Cygnet III" at 2015Z, that he actually was "using hand steering" (11th radiogram in the sequence previously listed).

Finally there is the still later message (12th and 16th in the sequence listed) that he "has got steering gear fixed" but that he couldn't steer as the rudder was too far out of water (by the ship being down by the head).

A fair interpretation of the messages therefore is that he had some undefined trouble with the steering gear, not very serious, since he got it fixed, and that meanwhile he used his hand steering gear but couldn't steer accurately, with the ship so far down by the head and the seas so high.

Thus, there is no justification for the finding submitted by Government counsel, and adopted by the Court, that the ship was "completely unable to steer by any method in heavy seas".

But even if you put this worst possible construction on the radiograms, it would be no proof of unseaworthiness of the steering gear. Many a ship has had her steering gear disabled in great storms.

"February 21. Vessel shipped huge sea, breaking cargo adrift and jamming steering gear." Log entry of The Newport News, 199 F. at page 970.

Steering chains parted in heavy weather. The Floridian, 83 F. (2d) at page 950. The books are full of such instances.

The best proof of the seaworthiness of the steering gear is the following:

1. Its use for a year across the Pacific and back on 5 voyages, with no failures of any kind, as proved by the log books for those voyages (Exhs. 40-44).

2. These log books show 65 tests of the steering gear, including the emergency gear.

3. The steering engine was inspected on each watch (6 times a day) by the oilers, and the whole steering apparatus by Chief Engineer Matthews each day, on these 5 voyages (Tr. 350-51).

4. After loading the barley at Vancouver, B. C. the vessel navigated the tortuous, winding, narrow channels of the inland waters of British Columbia and Puget Sound to Seattle,—a sure test of the steering gear.

5. On the trip from Seattle to the Pilot Station—67 miles—Pilot Lovejoy testified the ship handled perfectly.

6. She went through the heavy weather of Storm No. 1 with no difficulty.

7. She battled Storm No. 2 from January 8th until mid-morning of the 9th, *with no trouble in steering.*

8. She executed the most dangerous maneuver a ship can attempt, when she actually turned around in the vicious seas to return to Seattle. It was not until after that turn, that she first reported steering difficulty.

All these pragmatic tests recall Judge Fee's remark in The Iowa:

> "The ship at times had had failures in the Benson telemotor steering gear, but had traveled many thousand miles thereafter and prior to her final voyage, at which time it was held the gear was in good order and condition and the ship seaworthy in that respect." The Iowa, 34 Fed. Supp. 843, 846.

In addition to the foregoing, all of the PENNSYLVANIA's steering gear was thoroughly inspected and tested at her annual inspection in August, 1951, by Commander Hamilton and Lt. Rojeski of the U. S. Coast Guard and by the Chief Officer and Chief Engineer Matthews (Exh. 53 and 55; Tr. 658-62, 708-09. 494). The detailed test inspections were described by Commander Hamilton. These careful and experienced men all found the steering engine and all steering gear, including the emergency hand-steering gear, in good condition.

Mr. Miller, A.B.S. Surveyor, also examined the steering gear at this time. He testified:

> "I examined the steering arrangements, which consisted of the telemotor, hydraulic pumps and the

drive motors; emergency gear, and found them in a satisfactory condition . . ." (Tr. 411-12; Exh. 33).

The steering engine was again later examined by Mr. Vallet, mechanics from the Albina Engine & Machine Works and by Coast Guard Inspectors in Portland in November, 1951. At that time it was found that the extension control rod of the emergency hand steering gear extending from the poop deck down to the steering engine below turned hard. It passed through a cargo compartment and it was found that some army clothing had wrapped around the rod, making it hard to turn. It was still possible to operate it, but it was hard. This was removed and then everything was in order. At this time not only Mr. Vallet and the Albina people, but the Coast Guard Inspectors, passed the steering gear as satisfactory (Tr. 168-69). It is no moment anyway, because the rod was only for use in using the emergency hand-gear while the operator was standing on the poop in fair weather. It could be equally operated below by an operator in the steering engine-room itself, which, of course, would be the proper place in heavy seas (Tr. 372-73, 376-77). And we know from the radiograms that the hand steering gear actually was used.

The PENNSYLVANIA's log book for voyage 5, (Exh. 44) contains several entries concerning the testing of this emergency gear aft, the last one being as late as December 13th, 1951, as follows:

"From Moji Thursday, December 13, 1951
To Vancouver, B. C.
1620 Turned emergency wheel over Hard Right & Hard Left. All in Order. G. E. Elliott"

To sum up then this matter of the steering gear:

1. If the Court's Findings IV and V mean that one of the "faults, failures, breakdowns and defects" was failure of the steering gear and that such failure constituted unseaworthiness, there is no proof of it.

2. The temporary failure of steering gear in such a storm as the PENNSYLVANIA was encountering is not proof. It is even less so if it occurred, as seems likely, during the dangerous turning movement when, as Captain McMunagle has said, anything can happen. The situation is not unlike that in The Floridian, where, in heavy seas, her steering chains parted and her hand-steering gear was smashed. The Court said:

> ". . . From the mere breakage there is no evidence indicating negligence of the appellant to deprive it of the exceptions of the bills of lading. If competent men considered the vessel seaworthy, after an inspection, with full knowledge of repairs made, it indicated that due diligence had been used in preparation for the expectable tests and strains of her voyage, and the vessel owner was justified in believing her fit for the voyage. Any damages to the vessel later must be regarded, particularly in heavy seas, as resulting without fault on the part of the owner." The Floridian, 1936 A.M.C. 1006, 1009 (C.C.A. 2nd Circuit).

3. The seaworthiness of the steering gear is proven by the pragmatic test of use and by the many inspections and tests made by competent men.

4. The question at issue is not what happened out in the storm. It is *unseaworthiness at the inception of the voyage.*

5. The burden of proof is on the cargo claimants. They must prove not mere failure, but *in what respect* was the steering gear unseaworthy. Neither they nor the Court have suggested it.

6 How can they sustain this burden in the face of the pragmatic test of use, the many inspection-tests and the testimony of every man who ever examined the gear? The reliance rightly placed by the courts on such tests is illustrated by Judge Fee's statement in The Iowa:

> "Complaint was made of the engine and engineroom equipment. But this was all inspected, passed and approved by the Bureau of Marine Inspection and Navigation, and engineers who had operated the engines testified everything was in good and sufficient working order." The Iowa, 34 F. Supp. 843, 846.

7. We repeat, in the face of all this evidence, how can the cargo claimants sustain their burden of proof? There is nothing in the radiograms to help them.

The next "contributing factor" is

TAKING WATER IN NO. 1 HOLD

Like all the other "factors", this is stated to have "culminated from the unseaworthy condition of the vessel at the inception of her voyage"—without a hint of what that alleged unseaworthiness was.

Nor is there in the evidence any information at all as to *how* or *why* water got into No. 1 Hold. All that we have is the radiogram "TAKING WATER NR ONE HOLD". This was before the later messages saying tarpaulins were being taken off hatches, so it seems that

was not the cause and the cause was a mystery to the ship's master himself. For in his next message he says that he cannot "GET FORWAD TO SEE WHERE TROUBLE IS".

Now it is obvious that the mere taking of water in a hold is no evidence of unseaworthiness. It might come, as here, from the violence of the seas. Or it might come from some act of the master or crew after the ship left port, in the navigation or management of the ship, and having nothing to do with seaworthiness. Certainly it is no proof of unseaworthiness at the inception of the voyage, especially when every man who ever examined the ship testified that she was at all times a good, sound, seaworthy ship. It must always be kept in mind that the burden of proof is on the cargo to prove unseaworthiness. They have got to point out with particularity what the unseaworthiness was. This, of course, they have failed to do. The obvious cause was the violence of the seas.

The next "contributing factor" is

DECK CARGO COMING ADRIFT AND TAKING TARPAULINS OFF FORWARD HATCHES

This is the next thing, excerpted from the radiograms, and listed by the Court as among the "faults, failures, breakdowns and defects", constituting "factors of unseaworthiness", contributing to the vessel's sinking, and "culminating from the unseaworthy condition of the vessel at the inception of her voyage". Findings IV and V.

Here again the Court does not say what that unseaworthy condition was. He does not point out any defect

or failure in the securing of the cargo. He does not mention any cause why it came adrift. He does not even say which cargo came adrift, as indeed he could not, since the only information we have is from the radiograms, and they do not tell us. We do not know whether it was some of the 18 small 2-wheel trailers stowed by No. 2 and No. 3 hatches, or the "label" cargo stowed in the cribs by the break of the forecastle head. It seems obvious that before any attempt is made to establish liability on this score, we have to know which cargo came adrift and what the defect was, if any, which caused it. We have no information on that, and since the cargo claimants have the burden, they must fail.

Of course the mere fact that it came adrift is no proof at all, especially in the worst storm in thirty years. Deck cargos frequently come adrift. That is one reason why they are always carried, as this one was, at "shipper's risk".

The vague generality of the finding, amounting to no more than a conclusion, makes it rather difficult to discuss. But guided by what went on at the trial, we shall try.

All the cargo in the ship, including the deck cargo, was loaded, stowed, lashed and secured by the Government itself (the Army), the largest claimant here; (and one of the insurance companies is merely one of its subrogees and stands in its shoes.) This was done pursuant to the Government's amended contract of carriage with petitioner. M.S.T.-60, Exh. 132B. This provided as follows:

"ARTICLE 5. CARGO-LOADING AND DISCHARGING

". . .

"(b) The loading and discharging of cargo will be performed or arranged for by the Government. The Government shall prosecute and complete loading and discharging with reasonable dispatch. The cargo shall be efficiently loaded in the vessel using no more space than would normally be required for the loading of like cargo, but the Contractor shall at all times provide acceptable space for the loading of cargo shipping under this contract. 'Acceptable space' as used in this paragraph means such space as would normally be used by that particular type of cargo as declared at the time of booking and including normal access thereto. . . . Failure to provide acceptable space properly prepared for receipt of cargo would give the Government the right either to reject the space offered or upon agreement with Contractor to have the space properly prepared at the expense of the Contractor. . . .

". . .

"(h) Cargo shall be loaded, stowed, trimmed and secured by the Government under the supervision and to the satisfaction of the Master.

". . .

"(1) In no case shall the cargo exceed what the vessel can reasonably stow and carry, in the judgment of the Master. The amount of the deck cargo shall be at the discretion of the Master and the loading (when performed by the Government or its Agents) and carriage thereof shall be at the risk of the Government. Any material required for securing deck cargo is to be furnished by the Government and for its account, but the Government may have the use of any such material available aboard the vessel."

The deck cargo was a small one, about 67 long tons. No question has been made by cargo claimants regard-

ing the stowage and security of the 18 small 2-wheel trailers, nor of the two 7-ton trucks. The attack has centered on a shipment of some mild acid in some carboys and some acetylene tanks carried on the forward deck by the break of the forecastle head. Therefore we confine ourselves to that. This cargo is known as "label" cargo. Under the Stowage Regulations of the U. S. Coast Guard, it is not permitted to carry this below decks. It must be stowed on deck. The Army needed it in Japan, and it was stowed on the only place allowed,—on deck. The usual practice is to build a box or crib of heavy timbers, securely lashed, and to stow the label cargo in that. Such was the procedure in this case. Two such cribs were built, one on each side of the No. 2 hatch, extending from the hatch coaming to the bulwark rail of the ship, leaving just enough space for men to work there if necessary, and from the break of the forecastle head, aft to about two-thirds of the length of No. 2 hatch.

These cribs or boxes were strongly built and securely lashed with three-quarter inch chains extending athwartships over their tops and sides and with a chain "belly-band" to prevent it shifting aft from the break of the forecastle head. The "label" cargo was tightly stowed in them.

These cribs were not high. They extended only four and one-half to five feet above the deck, or a foot to one and a half feet above the ship's bulwarks, at their lowest part (Tr. 992-1002, Exhs. 17, 18 and 19; Tr. 1075-82, 1138-39, 1185-87, 1197-98, 1734-35, 2682-2690, Exh. 187).

As stated, the work was all done by the Government's own stevedores. Sam Kamel, a lashing foreman of experience, was in direct charge and testified that the Army demands extra strength and heavier timbers than is usual in commercial practice, and in this case those demands were met. He concluded his testimony by saying that the ship was well and properly stowed and secured for sea (Tr. 1063). The chains were furnished by the Army itself. Exhs. 81 and 132B.

A. L. Hughes, a supercargo employed out of the Union Hall by various companies, but in this instance by petitioner, described the cribs, the label cargo tightly stowed, the lashings good, said he had seen lots of these cribs and this was as good as any he ever saw (Tr. 1139-40, 1152).

Captain R. A. Johnson, master mariner with much sea experience and acting at this time as surveyor for the National Cargo Bureau, said that he was on the ship as late as January 4th 3:00 P.M., and "that there was no special problem in regards to the deck load" (Tr. 1734).

Captain A. B. Johnson (no relation), surveyor for the San Francisco Board of Marine Underwriters, with seventeen years' experience at sea as master, described the cribs. He, who was on the ship as late as the morning she sailed, and whose "primary interest was to check the securing of it" (the deck load) (Tr. 1214), approved it all (Tr. 1198-99, 1214).

The functions of these two cargo surveyors entitle their testimony to special weight. For, as Captain R. A.

Johnson said, those functions are "To promote safety at sea for cargo, vessel and crew in relation to the stowage or cargo" (Tr. 1729).

F. G. Allison, supercargo of long experience, who has worked often for the Army, but in this instance was acting for the petitioner, likewise described the cribs and approved them throughout (Tr. 1081, 1109).

Finally, and most important because he was the Government's (Army's) own supercargo, Captain Sheldrup described the cribs and their lashings and the stowage of the cargo and said that they were good and he approved them all (Tr. 2697).

The main attack, however, of cargo claimants has been not so much on the cribs nor their construction as on their *location*. They claim that they should have been located aft of the midship house by No. 4 hatch, instead of up forward, by Nos. 2 and 3.

All of the witnesses concerned with this, Captain R. A. Johnson, Captain A. B. Johnson, Captain Sheldrup,—all three past-shipmasters experienced in carrying deck cargos,—fully approved the forward location (Tr. 1734, 1198-99, 2690, 2697).

Indeed, the two men most concerned, Captain Plover, the master of the ship, and Captain Sheldrup, supercargo for the Army, owner of the cargo, discussed the matter and expressly designated and approved the forward location, and gave the reasons therefor (Tr. 2686-90, 2697, 2716-17).

Remember that Captain Sheldrup was an experienced shipmaster himself, and the Government's own man;

and that Captain Plover was the man responsible for the safety of his ship, cargo and the lives of himself and crew. Captain Plover himself requested the forward location (Tr. 1153, 2716-17). The reason for that request was that he considered it a better and drier place than the location aft, where, indeed, he had had trouble with acid cargo shifting on a previous voyage. His log book for Voyage 4, under date of August 24th, contains the entry:

> "Shipped over starboard after deck tearing acid cargo box adrift and damaging forward starboard No. 4 boom rest; cargo shifting."

He knew his own ship, and he told Sheldrup: "This ship is very good by No. 2 hatch where the break—by No. 2 hatch by the break of the forecastle head. That is where we want it." (Tr. 2716-17). He exercised his discretion as a master, and that is where it was put.

In addition to all of these men who actually saw the cargo stowed, and whose duty it was to see that it was put in a good place, we have the corroborative evidence of Captain Reid of the "SHOOTING STAR", a disinterested third-party witness. It was not petitioner, it was claimants' counsel, who elicited this testimony from him:

> "Q. Have you ever carried acid?
> A. Yes.
> Q. In what form?
> A. In a carboy, yes.
> Q. Where did you carry it?
> A. On deck.
> Q. Where on deck?
> A. Well, sometimes between 4 and 5, sometimes at the break of the house by No. 2.
> Q. That would be just forward of the house?
> A. That is just referring to the "Shooting Star"?

Q. No.
A. You are referring to general?
Q. Yes.
A. *I know, on the Victories we used to carry it on the break of the house. Break of your forecastle head just forward of No. 2 or alongside No. 2, or back at No. 5."* (Italics supplied) (Tr. 1836).

To contradict all this mass of evidence, claimants produced only one witness, Mr. Gilmour. He testified that in his "opinion" the vessel was not seaworthy for a voyage across the North Pacific with acid stowed forward by the No. 2 hatch (Tr. 2339). This, of course, was only an opinion and its value must be judged by the witness's qualifications. He did not have them, and he testified over objection. He has been to sea only in the engine department and rose to chief engineer. He came ashore and was port engineer for Pacific Steamship Company until 1936, and until 1938 for the Alaska Steamship Company (Tr. 2269). He has never been a deck officer in his life, and it is deck officers and not engineers who handle and stow cargo. His only acquaintance with "label" cargo was that, while port engineer, he instructed his port carpenters to build boxes for it on deck for the Pacific Steamship Company (Tr. 2278), where the *location* would be decided, not by him, but by the mate or master (Tr. 2303). Furthermore, it is well known that Pacific Steamship Company was engaged only in the coastwise trade, largely to Alaska's inland waters, and with small ships. The qualification of small ships is important because, as Captain Sheldrup says, on *small* ships he too would carry the acid aft. But this does not apply to large ships like Victories. Mr. Gilmour has

never made a voyage as chief engineer across the North Pacific (Tr. 2315); nor on a Victory ship; nor on a Liberty ship. In short, he has never had any experience at all with carrying acid cargos across the North Pacific in cribs or otherwise. After he ceased being port engineer for the Alaska Steamship Company, he became a hull and machinery surveyor for Alexander Gow in Seattle. As such, he is competent, but cargo surveying is entirely out of his line. As he said himself, referring to hull and machinery, "That part of the business keeps me pretty busy", and he only does cargo-surveying "once in a while" when the other men of his organization are busy (Tr. 2309). He has acted only once as cargo surveyor for a vessel bound for the Orient, and that ship carried no "label" cargo (Tr. 2279). In short, Mr. Gilmour has no qualifications to warrant his opinion being accepted as against the testimony of the many competent men, ex-sea-captains and surveyors, who actually saw this cargo loaded and approved it all, including Captain Sheldrup, the Government's own man,—and Captain Plover.

We pass over the testimony of Captains Ulstad, and Harry Johnson, and Mr. Maurice, for their qualifications were of the slightest, and they did not condemn the stowarge forward as unseaworthy. They merely expressed a preference for after-deck stowage. But that, of course, is a choice which must be left to the master.

Mr. Gilmour also had some criticism, which he did not press very strongly, that the cribs would have been "better" if they had been "parallel" (by which he meant exactly rectangular) instead of "tapered" as they slightly were, since the outboard side of each crib more or less

followed the sheer of the ship (Tr. 2281, corrected Tr. 2387). His reason was that the carboys could be blocked off better in a "parallel box" (Tr. 2280).

Of course, the testimony was that they *were* blocked off and that it was a tight stow (Tr. 994, 1078, 1140). Also, a glance at Exhibit No. 17, which is a photograph of this part of a Victory ship will show how slight any taper would be, only a foot or two in the whole length of the crib (Tr. 1035-36). He did not say that the taper would make the crib unseaworthy. He merely expressed a preference for a rectangular crib being "better". None of the other many witnesses already named agreed with him. So we say no more about it.

Finally, we come to a matter which, it seems to us, is conclusive:

Article 5 of MST-60, already quoted, says that the contractor (the petitioner here) shall provide "acceptable space" for loading the cargo. It then defines "acceptable space" as "such space as would normally be used by that particular type of cargo". "Failure to provide acceptable space" gives "the Government the right to reject the space offered" (Exh. 132B).

The Government did not reject the space in this instance. It accepted it. This was an acknowledgement on its part that it was "acceptable space" and such as "would normally be used by that particular type of cargo". This, therefore, is conclusive proof that the place where the crib was built, forward by No. 2 hatch, and the structure and shape of the crib itself were "such as would *normally* be used" and is an admission of the seaworthi-

ness of the crib and its location. "The shipper bargains for no more than usual carriage". The Pacific Fir, 57 F (2d) 965, 967.

Furthermore the "loading" and "carriage" of this deck cargo were "at the risk of the Government" M.S.T.-60, Article 5(1). Exh. 132B.

SECURITY OF THE HATCHES

The Court's finding that the deck cargo came adrift taking the tarpaulins off the forward hatches does not find any fault with the hatches or the manner in which they were secured. He attributes the taking off entirely to the deck cargo coming adrift,—very natural in such a storm. The Court was correct. The radiograms themselves assign that as the cause, and we agree with them and the Court. Since he ascribes no fault to the hatches or the tarpaulins, perhaps we should let the matter rest here.

We note briefly, however, some testimony adduced by the claimants that the cross-battens across the hatches on *Voyage 5* were bent. The testimony was of the weakest, coming, as it did, from two ordinary seamen (a cab driver (Tr. 2093), and a car salesman (Tr. 2097)) and an old ship's carpenter, and was irrelevant anyway, since it pertained only to *Voyage 5 and it is Voyage 6* with which we are concerned. Furthermore, these witnesses admitted that in spite of any "bending", they were able at all times, by screwing up the turnbuckles, to keep the cross-battens tight across the hatches; which, of course, is all that is required (Tr. 2096, 2102-3, 2086-87).

The truth is that the bend which these witnesses were talking about was probably the natural, intentional, slight curve or spring, present in all cross-battens to facilitate their being tightened up with the turnbuckles, and which may readily be seen in the photograph of a hatch (Exh. 19).

It may be noted too that the ship was equipped with cables which could have been used as substitutes for cross-battens or as supplemental thereto had the master so chosen (Tr. 306, 1230).

In passing, we observe that it is only Nos. 1 and 2 Hatches that are in question. No. 3 Hatch was never mentioned in the radiograms at all. Also it is difficult to see how drifting cargo could take tarpaulins off No. 1 Hatch, since that hatch was up on the higher forecastle deck where there was no cargo.

But regardless of all this, the testimony of all the witnesses who were on the ship at the *beginning of Voyage 6,* just before she sailed, and whose responsibility it was to know something about these hatches, is that the hatches were battened down in good shape, with three tarpaulins each (where only two are required), and with all the battens and cross-battens good. Allison (Tr. 1091-94), Capt. A. B. Johnson (Tr. 1188, 1208). We especially note supercargo Capt. Sheldrup because he was the Government's own man. He was right at No. 1 Hatch when they opened it and rebattened it, and was right at No. 2 Hatch after it had been battened, and while they were lashing the acid cribs, and he observed nothing wrong with the cross-battens at all (Tr. 2694-97).

Although the other hatches are not involved, he testified they were all battened securely (Tr. 2697).

It can hardly escape attention that although the ship was swarming with longshoremen and army personnel, the Government, the largest claimant here, did not call a single witness from these, its own people, to refute the above testimony.

Although an earlier radiogram from the ship, ninth in the sequence listed, said the deckload was "taking" the tarpaulins off the forward hatches, a later radiogram, eleventh in the sequence listed, says,—"TARPS FWD HATCHES STILL HOLDING".

The fact that they were still holding, this late in the storm, in spite of the many hours battering of the seas, is the surest indication that the hatches and cross-battens in general were very good.

The trial court evidently thought so too, and we'll let it go at that.

We hope we have not labored these matters too much. The essence of it all is that there is no proof that the vessel at the inception of her voyage was unseaworthy in respect to her deckload, or the security of her hatches. The meager facts gleaned from the radiograms are certainly not evidence of unseaworthiness, considering the violence of the storm the ship was in. While the deck cargo coming adrift taking the taupaulins off the hatches is grouped by the trial court, along with other matters, as a contributing factor of unseaworthiness culminating from unseaworthiness at the inception of the voyage, he nowhere says *what* that unseaworthiness

was,—nowhere says the deck cargo was improperly stowed or secured, nowhere finds fault with the tarpaulins or their battens or the hatches. He really could not. For there was no proof. And the burden was on the cargo claimants.

The next "contributing factor" is

NO. 2 HATCH OPEN AND FULL OF WATER

This is the last of the "contributing factors" listed by the Court as one of the "faults, failures, breakdowns and defects" "culminating from the unseaworthy condition of the vessel at the inception of her voyage".

We do not feel like spending many words on this. With the deckload taking the tarpaulins off the hatch, thus admitting water, with the ship down by the head, making it easier than ever for the tremendous seas to come aboard and pound this hatch, it is no wonder that the hatch covers were torn off or smashed. This is not evidence of unseaworthiness.

> "Nautical periodicals contain repeated accounts of the damage done even to well-found ships, steam as well as sail, by the masses of water that may fall on board when such seas break; of decks swept clean of boats and houses, of bulwarks carried away, *and of hatches stove in by the mere weight of water.* Many a ship has been lost with all hands under such circumstances."

Quotation from "Wind Waves at Sea, Breakers and Surf", Navy Department Hydropraphic Office Publication No. 602, at page 51 (Exh. 129). And, as Captain McMunagle testified, in seas like that anything can happen (Tr. 2009).

Indeed it was cargo claimants' counsel himself, Mr. Gearin, who brought this out in his cross-examination of Mr. Vallet:

> "Q. Sometimes a sea itself will tear tarps loose, won't it?
>
> A. Yes.
>
> Q. Sometimes the hatches will be stove in because of the water? I am referring particularly to the forward hatches.
>
> A. In extremely bad weather, yes." (Tr. 234).

And again:

> "Q. Just a few more questions and I can be through by 12:00 o'clock, Mr. Vallet. Would you say when you get into violent seas that a sea could hit the side of a hatch and tear the tarps off and rip the battens off?
>
> A. That has happened, yes." (Tr. 236).

As already remarked the trial court has not pointed out a single item wherein the hatches or their covers were unseaworthy; or why the No. 2 hatch was open and full of water. He has merely made a generalization that the ship was unseaworthy at the inception of her voyage. Certainly, with the burden of proof on the cargo claimants to prove unseaworthiness, this Court will not follow any such generalization as that, with no proof to support it.

LATENT DEFECTS AND DUE DILIGENCE

The Court erred in not finding that if there were any defects in the ship, they were latent and not discoverable by due diligence, and in not finding that petitioner had exercised due diligence to make the ship seaworthy. Specifications of Error III and V.

The questions of latent defect and due diligence are so closely related that we shall discuss them together.

SUMMARY

If the loss was caused by any defects in the ship, (which we do not admit), they were latent and not discoverable by due diligence, and on that ground petitioner should have been exonerated.

If the loss was caused by any unseaworthiness of the ship, of any kind, latent or not (which we do not admit), the petitioner should nevertheless have been exonerated because it proved that it used due diligence to make the ship seaworthy.

FIRST, AS TO LATENT DEFECTS—ARGUMENT

The Carriage of Goods by Sea Act, 1936, provides that the ship shall not be responsible for loss or damage arising or resulting from "latent defects not discoverable by due diligence",—Title 46 USCA § 1304(2)(p). The Canadian Act provides the same.

We do not concede that there were any latent defects in the PENNSYLVANIA, but if there were, and they caused the loss, petitioner is nevertheless entitled to exoneration under this exemption.

The trial judge, in his Memorandum Opinion, made findings on this point, which, if logically carried out, should have resulted in a decree of exoneration. He said in his Memorandum Opinion:

> "Just what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty, although it can be gathered from

> radiograms sent from the vessel that several contributing factors could have been responsible."

It seems clear from this language that whatever the "contributing factors" were, they resulted from "latent defects".

Further on in his Opinion he was even more specific.

He said:

> "Upon an examination of the record I find that any defects in the vessel which caused her to sink were not apparent. Those charged with her inspection used the care of reasonable and prudent persons. . . ."

Here is a flat and specific finding that the defects, if any, in the vessel, *"which caused her to sink"*, were not *"apparent"*. And the finding is followed in the next sentence by the specific statement that those in charge of the vessel's inspection "used the care of reasonable and prudent persons", which, if language means anything, means due diligence.

Why the Court ignored these findings and gave no effect to them in his decree, we cannot explain. But it seems plain that in not doing so, he fell into an error which changed the whole aspect of the case. The failure to enter a decree in accordance with these findings was "clearly erroneous".

Opposing counsel may point to Article VI of the Findings, in which it is stated that the petitioner did not use the due diligence required by law to make the vessel seaworthy. This is a general finding, without any reference to latent defects. It is so contradictory to the findings in the Memorandum Opinion that we think it

should be given very little weight in this Appellate Court. Though adopted by the trial court, this finding was prepared by the Government counsel, and should not outweigh the findings in the Memorandum Opinion which, presumably after mature consideration, were the Court's own. The Court never recalled, or amended his Memorandum Opinion. From which it must be inferred that he intended it to stand, as his own independent Findings.

If this be so, then there is an end of the matter, for the Opinion covers *all* the alleged defects, whatever they were, and says they were *latent.*

But regardless of this, the evidence itself justifies this defense against those alleged defects most insisted upon. We refer particularly to the "notch sensitivity" of the steel and the steering gear.

Take the steel. We shall not again refer to all the evidence that it was *not* notch sensitive, but was, on the contrary, good tough steel (Br. pp. 82-88, 97-99).

We confine ourselves now merely to showing that if it *was* notch sensitive, there was no way to find it out. There was not even any indication or warning to put the petitioner on notice. The 22-foot deck crack was no indication—fully explained by Mr. Vallet as it was (Tr. 211-215). Cf. Mr. D. P. Brown's testimony that it was of no significance (Tr. 2743). In fact its failure to propagate further indicated good steel (Tr. 2923)—a fact borne out by Mr. Williams' laboratory analysis (Tr. 1859, 1869, 1875, 1877-78). (It is worth noting that *many* ships have cracks, as witness Mr. Williams having received samples

from 114 ships (Tr. 1857-58), and Mr. Vallet's testimony that over a period of 12 or 14 years he had repaired hundreds of them (Tr. 262).

But more important still is the fact, admitted on all sides, that there is no way of determining notch sensitivity except in a laboratory,—no test except a "destructive" test, which means taking the steel plate to a laboratory and breaking it up. Also is the admitted fact that a ship's plate, found to be notch sensitive, is no indication that the plate next to it may be so (Tr. 1877). Nor is the fact that a ship may have repeated fractures, significant. It may result from other factors.

Thus, Mr. D. P. Brown testified:

> "Q. Is there any known non-destructive test that can determine the notch sensitivity or strain-aging of steel?
>
> A. None that I know of.
>
> Q. Is there any test by which a shipowner experienced in craftsmanship could go over the rest of his ship to determine whether parts of the ship were subject to cracking?
>
> A. There is no such means." (Tr. 2746-47).

Elsewhere he testified:

> "Q. Is there any way of telling that because a certain plate cracks in a ship that some other plate in the ship, even an adjacent plate, may be subject to cracking?
>
> A. No, sir; I know of no method. I know of no correlation between a fracture in one plate and the quality of the next plate." (Tr. 2741).

He also testified that even repeated fractures (which the PENNSYLVANIA had not), are not significant, and why (Tr. 2742-43), and that in spite of all the research

and all the money spent by the governmental agencies and his committee in studying the problem of brittle fracture, the problem has not been solved (Tr. 2810).

How then, it may be asked, could this petitioner solve it, even if we should concede that this ship presented such a problem?

Mr. Williams, the Government's expert, confirmed Mr. Brown.

He testified:

> "Q. Do you know, Mr. Williams, that the test of a deck plate of a ship is no indication of the quality or strength or notch sensitivity of another plate on a different part of the ship?
>
> A. That is perfectly true." (Tr. 1877).

And again:

> "Q. Is there any known test of that character (non destructive)?
>
> A. No, there is not.
>
> Q. There is not. The only way you can determine the notch sensitivity of a piece of steel or steel plate is to take it apart and put it in the laboratory and test it; isn't that true?
>
> A. That is true." (Tr. 1878-79).

He also agreed with Mr. Brown that the problem of notch sensitivity had not been solved (Tr. 1879).

Even Mr. Hechtman had to agree that the only possible tests were laboratory tests, and that he did not mean to say that it would be possible to go over the body of a 450-foot ship and determine whether any plate was stain-aged (Tr. 2613), and that the problem of brittle fractures has not been solved (Tr. 2591-92).

It is quite evident from the foregoing that if the ship was anywhere notch sensitive (and all the evidence points the other way), it was a latent defect, not discoverable by due diligence, for which the shipowner would not be liable. (46 USCA § 1304(2) (p), and the identical Canadian Act.)

As to the steering gear. Neither the Trial Court, nor anyone else has pointed out wherein it was defective. The Court's Opinion treats all the alleged defects as "latent" and this would include the steering gear. We deny any defects at all. Any failure was due to the storm. But if there *were* any defects, latent or not, they certainly were not discoverable by due diligence. We shall discuss the steering gear presently under that heading.

DUE DILIGENCE TO MAKE THE SHIP SEAWORTHY

The Court erred in holding that the petitioner had not sustained the burden of proving this. Finding VI.

This is the statute:

> "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section." 46 USCA § 1304(1).

The Canadian Act is the same.

There is no question here about the ship being properly manned, equipped and supplied or making the holds safe for the carriage of goods; and the ship had no refrigerating chambers. The only questions pertain to the ship's hull and equipment and the question raised by the insurance cargo-claimants about the crib holding the label cargo. Therefore we confine ourselves to those questions. Observing, however, that much of the evidence already alluded to, to prove seaworthiness, applies equally to proof of due diligence, and will not be repeated.

First, as to the hull and equipment.

We do not see what more any shipowner could have done, more than this shipowner did, to exercise due diligence to make the ship seaworthy. It complied with every requirement of the American Bureau of Shipping and of the U. S. Coast Guard, those guardians of public safety at sea. In fact, it exceeded those requirements, as we shall show.

Let us begin with the condition survey at the time the ship was sold to petitioner. She was thoroughly reconditioned at that time and everybody,—the representative of the Government, Mr. Tucker, the American Bureau surveyor, Mr. Miller, the Coast Guard Inspector, Commander Rivard, the representative of the former charterer, Mr. Knowles, the representative of Salvage Association of London, Mr. Gilmour, the representatives of the purchaser, Mr. Vallet and Mr. Brennecke,—all agreed that she was seaworthy at that time.

(Exh. 2, 31, Tr. 748, 399, 613-14, 456, 2383, 144-45, 328).

We believe we can take that as an established fact.

The ship made three voyages, all satisfactory, and then had her annual inspection by the Coast Guard and the American Bureau in August, 1951. This was a very thorough inspection. The ship was gone over minutely, as the inspection books and the testimony of Commander Hamilton and Lt. Rojeski, and the report and testimony of American Bureau of Shipping surveyor, Miller, and the testimony of Mr. Vallet and Mr. Matthews and Captain Bishop, all show (Exh. 13, 33, 53, 55; Tr. 656-670, 676-680, 686-691, 699-722, 410-414, 170-172, 346-47, 494). It is interesting to note from the surveyor's report (Exh. 33), and the Coast Guard Inspector's Exhibits 53 and 55 that the steering gear was thoroughly tested and found good, and in Rojeski's book, Exhibit 55, the cross-battens are especially included in the equipment passed as satisfactory.

The ship made Voyage 4. On Voyage 5 the deck crack occurred. The ship returned to Portland, and there complete repairs were made by putting in new plates where necessary and veeing out and welding the crack where new plates were not necessary. This work was all done to the complete satisfaction of American Bureau surveyor, Pratt, Captain Endreson of the U. S. Coast Guard, Mr. Webb, representing Lloyds, and Captain Bennett, representing the U. S. Salvage Association, Mr. Sloan, Superintendent of Albina Yard, who did the work, and of course Mr. Vallet who was present in person. Mr. Vallet and these other men inspected both

above and below deck. The deck was hose-tested with water and the repair was found complete. (Exh. 10, 11, Tr. 162-68, 177; Exh. 66, Tr. 897; Exh. 63, 64 and 65; Tr. 872-76; Exhibit 84; Tr. 1123-25; Exh. 85; Tr. 1129-36; Tr. 843-44, 848-50). In fact it never did give any more trouble and even the trial judge conceded that this crack was fully repaired. Finding V.

An instance occurred at this time which demonstrates the due diligence of petitioner. Mr. Vallet, while examining the deck from below, noticed on the port side, opposite the starboard side where the crack had occurred, a small streak of rust where a padeye had formerly been. This indicated to him a tiny crack not more than two or three inches. Since the large deck crack had apparently started from a similar padeye, Mr. Vallet had this little rust place cut out and a circular plate inserted in the deck—circular to avoid any notch (Exh. 12 and 12A; Tr. 164-67). He was not required to do this. The Coast Guard did not demand it. He did it in conformity with the standard practice of petitioner to maintain its ships in the highest degree of efficiency and safety.

The vessel made Voyage 5 and went on drydock at Todds December 20th and 21st, 1951. There the hull was sandblasted to remove all old paint and any marine growth and then was thoroughly inspected by the Coast Guard, the American Bureau and the petitioner's personnel. The inspectors were Commander Hamilton and Commander Brown of the Coast Guard, Mr. Wilson of the American Bureau, Mr. Brennecke, Port Engineer of the petitioner, Mr. Matthews and Mr. Reid, Chief En-

gineers. All these men found the ship in good order. (Exh. 15; Exh. 54; Tr. 670-76; 723-35; Exh. 57; Tr. 749-764; Tr. 331-35; 1715-23; 347-49; 377-78). This was only fifteen days before her fatal voyage.

When a ship is thoroughly inspected and declared seaworthy in all respects by the American Bureau and the Coast Guard, the official guardians of safety at sea, and when their inspectors are accompanied by the petitioner's own personnel, competent man, and all find the ship seaworthy, it is difficult to imagine what more a shipowner could do.

Relevant to the high regard paid to such a classification society as the American Bureau of Shipping, the American equivalent of Lloyds, the following statement in Scrutton on Charterparties, 16th Edition, at page 474, commenting on the obligation to exercise due diligence to make the ship seaworthy is worth noting:

> "Where a fault in design has been approved in error by a classification society such as Lloyd's, the view has been expressed that the owner would escape liability either on the ground of the public and quasi-judicial position of such societies or because to go behind the certificate of such a society might lead to an almost unlimited retrogression."

AUTHORITIES

> "Of course the duty to exercise due diligence cannot be delegated, nor is there any attempt to do that here, but it is difficult to understand how the ship, or her owner could have been more diligent. It would be difficult to suggest more competent persons to make such inspections than the surveyors of the American Bureau of Shipping, the United State Government Inspectors of the Department of Commerce, the Port Engineer and Marine Superin-

tendent of the claimant, and the officers of the ship itself, . . ." The Zarembo, 44 F. Supp. 915, at p. 919 (E.D.N.Y. 1942), affirmed 136 F. (2d) 320; cert. den. 320 U.S. 804.

" . . . If competent men considered the vessel seaworthy, after an inspection, with full knowledge of repairs made, it indicated that due diligence had been used in preparation for the expectable tests and strains of her voyage, and the vessel owner was justified in believing her fit for the voyage. Any damages to the vessel later must be regarded, particularly in heavy seas, as resulting without fault on the part of the owner.

. . . . .

"All the work of reconditioning the ship was done at a responsible shipyard under the advice of a competent naval officer (architect). This was due diligence." (Citing authorities.) The Floridian, 1936 A.M.C. 1006, at pp. 1009-10, 83 F. (2d) 949, 951 (CCA 2d, 1936); cert. den. 299 U.S. 577.

" . . . After the repairs had been made, the vessel was inspected and passed by the American Bureau; and on February 28, 1931, she started for Porto Rico, arriving at San Juan on March 10, 1931. Before leaving San Juan on March 18, 1931, on the return voyage, the No. 4 hatch was again inspected and no evidence of any structural weakness was found at that point. I do not know what more than this could fairly be asked to satisfy the requirements of due diligence." The Emilia, 1936 A.M.C. 22, at pp. 22-24, 13 F. Supp. 7, at pp. 8-9 (S.D.N.Y. 1935).

"Due diligence is that diligence which a competent vessel owner would or should exercise under the circumstances. The Bill, D.C., 47 F. Supp. 969. The S.S. Troubador was reconditioned in 1941-1942 and received a seaworthy certificate from the American Bureau of Shipping in December, 1942. New boilers were installed by a reputable marine boiler maker. In December, 1942, the vessel was drydocked

> and extensive voyage repairs were made in Philadelphia. Voyage repairs were made at New York and Norfolk just prior to the voyage to Santos. At Santos voyage repairs were made and the classification surveyor surveyed her holds and declared her to be seaworthy and 'fit to carry dry and perishable cargo'. I think respondent has shown it did exercise due diligence to make the vessel seaworthy." General Foods Corporation v. The Troubador, 98 F. Supp. 207, 210.

Besides the foregoing official inspections, it was standard practice on petitioner's ships for Mr. Vallet, Mr. Brennecke or some other representative of Mr. Vallet, to meet each vessel on its return, go over, with the officers, the ship's performance on the voyage, discuss any voyage repairs needed and have them made (Tr. 230-31). This was done on the PENNSYLVANIA. Chief Engineer Matthews submitted a list of voyage repairs on the return of Voyage 5 (Exh. 14). They were minor. A few small "betterments" were eliminated from the list as unnecessary. The rest were carried out (Tr. 173-75, 334).

The petitioner rightly relied on its ship's officers, all competent men, to maintain the ship in a constant state of seaworthiness and to report any deficiencies noticed on a voyage and needing attention (Tr. 172-73, 188, 230-31, 270). Chief Engineer Matthews illustrated this when he testified that every time a hold was empty on a return voyage, he and his first assistant and the mate, and sometimes another mate, would go down into the hold and inspect it thoroughly for cracks, excessive rust, hatch boards broken, or anything, and make a report on it, and that he made such an inspection of the ship

on Voyage 5 on the way back, and found nothing wrong at all (Tr. 379-80).

We remarked earlier that the petitioner, in the care of its vessels, exceeded the Coast Guard and American Bureau requirements. For example, when the petitioner bought the ship it made improvements in her at considerable expense. It cut freeing ports in the forward bulwarks to release water from the decks more readily. It installed a water-tight door where none was before, and made doors watertight not so before (Exh. 6; Tr. 150-52, 328-31). It provided three good tarpaulins for every hatch (Exh. 55), whereas only two are required (Tr. 703). It equipped the ship with radar (Exh. 6), which is not required. Mr. Vallet's cutting out the little rust streak in the port side of the deck, already referred to, was merely done out of abundant caution. It was not required, but he did it.

Let us now consider the steering gear. It was thoroughly tested at the Annual Inspection in August and found good. See Commander Hamilton's inspection book (Exh. 53), and testimony (Tr. 657-62), and Lt. Rojeski's inspection book (Exh. 55), and testimony (Tr. 708-09). It functioned perfectly up until the last hours of the wreck, and in the final hour was working again. It was inspected by Chief Engineer Matthews every day (Tr. 350-51). And the log books of the ship show at least sixty-five operating tests (Exhs. 40-44). In fact, it is standard practice to test the steering gear every time before a ship leaves her berth. What went wrong with the steering gear, of course, we do not know. Whatever it was, can be attributed to the storm. Certainly all the

evidence shows that the petitioner used due diligence to make it seaworthy. The Trial Court himself evidently considered the defect, whatever it was, to be "latent", and not "apparent", and that those charged with the inspection of the ship "used the care of reasonable and prudent persons". (Opinion). This was certainly a finding of due diligence.

We do not think it necessary to discuss the hatches or the label cargo crib further, except to say this in regard to the crib. The very fact that Captain Plover, Master of the ship, having in mind the previous trouble with label cargo stowed aft, gave thought, care and attention to a better place to stow it, and chose the forward location because "This ship is very good by No. 2 hatch" (Tr. 2716) shows due diligence. That is not the act of a careless man. It is the act of a competent, careful, prudent man, considering all the factors. And that is due diligence. If the crib was damaged by the seas, that does not militate against the Captain's due care.

> "Due diligence is that diligence which a competent vessel owner would or should exercise under the circumstances." The Troubador, supra.

This the petitioner did.

CONCLUSION

These are the contentions of the petitioner:

That the storm encountered by the PENNSYLVANIA was clearly a peril of the sea and was the cause of the ship's sinking;

That the petitioner having proved a peril of the sea, the burden shifted to the cargo claimants to show un-

seaworthiness as the cause of the loss, and particularly what that unseaworthiness was. This they have failed to do.

On the contrary, the petitioner, though not having the burden, has proved seaworthiness.

But if, contrary to these contentions, the Court feels that the cargo claimants have sustained the burden of proving unseaworthiness, then, whether the defects be latent or not, nevertheless the petitioner still escapes liability if it proves due diligence, and this petitioner has clearly done.

The trial court's findings and conclusions, contrary to the above contentions, are "clearly erroneous" under the doctrine of McAllister v. U. S., 348 U.S. 19, 99 L. Ed. 20, recently followed by this Court in Permante Silverbow-Colorado, 1956 A.M.C. 695, and we believe this Court will reach "the definite and firm conviction that a mistake has been made" and will correct it. In fact the findings themselves, on the storm and unseaworthiness, partake rather of the nature of conclusions.

We therefore ask this Court to reverse the present interlocutory decree and enter a decree granting complete exoneration (Specifications of Error IV and V).

A final word. It has three times been declared by Congress to be the purpose and policy of the United States, as necessary for the national defense and for the proper growth of its commerce, to have a merchant marine owned and operated privately by citizens of the United States, and it is declared to be the policy of the United States to foster the development and encourage

the maintenance of such a merchant marine. (Merchant Marine Act, 1920; 46 USC § 861; Merchant Marine Act, 1928; 46 USC § 891; Merchant Marine Act, 1936; 46 USC § 1101.) In furtherance of that policy, Congress has replaced the old Harter Act with the more equitable Carriage of Goods by Sea Act, 1936, (COGSA), requiring that the shipowner shall be liable for unseaworthiness only if the shipowner failed in due diligence to make the ship seaworthy in that respect which caused the loss.

We suggest to the Court that, just as Mr. Justice Holmes warned against too easy a finding of privity in a limitation case, as defeating the purpose of the statute, so too easy a finding of unseaworthiness or too easy a finding of lack of due dilligence by the courts tends to defeat this public policy as declared by Congress.

Seaworthiness is only reasonable fitness for the voyage and due diligence is only reasonable care.

On these issues, the cargo claimants are asking this Court to second-guess the many competent men whose job and responsibility it was to pass upon them, including the officers of the ship whose lives depended on them.

Respectfully submitted,

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APPENDIX

Judge Ling's Opinion—Tr. 71

[Title of District Court and Cause.]

MEMORANDUM OPOINION

This case was brought to trial after ample and exhaustive preparation. The issues are simple and I do not believe a review of the evidence would serve any useful purpose. I shall, therefore, merely state my conclusions without attempting to find support for them by reference to the record.

First to be determined is whether the Pennsylvania storm was of such magnitude as to constitute a peril of the sea. I do not think it could be so considered. It is apparent from the evidence that the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route. There appeared to be nothing catastrophic about the storm. Other vessels withstood the wind and the seas, which leads to the inescapable conclusion that the Pennsylvania was not seaworthy, or it too would have survived.

Just what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty, although it can be gathered by radiograms sent from the vessel that several contributing factors could have been responsible.

The court having found the vessel to have been unseaworthy the next question is whether under the facts

and circumstances petitioner should be denied the right of exemption from liability under the statute, by having imputed knowledge that the vessel was not seaworthy, thereby making it privy to the existence of such conditions.

Upon examination of the record I find that any defects in the vessel which caused her to sink were not apparent. Those charged with her inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without privity or knowledge of the owner of the vessel.

My conclusions are that the Pennsylvania must be held to have been unseaworthy, but her unseaworthiness and her fault are held to have been without the privity or knowledge of her owner, and the petitioner is entitled to limit the liability of the vessel to the pending freight. The motion to dismiss the petition is Denied.

Dated: Phoenix, Arizona, November 17, 1955.

/s/ Dave W. Ling,
Judge

[Endorsed]: Filed November 21, 1955.

Findings and Conclusions—Tr. 72-78

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title of District Court and Cause.]

The above-entitled cause coming on for trial commencing on the 13th day of July, 1954, upon the peti-

tion of States Steamship Company, under the provisions of Sections 183 et seq. of Title 46, United States Code, for exoneration from or limitation of liability from all claims arising out of the sinking of the SS Pennsylvania, formerly the Luxembourg Victory on January 9, 1952, with the total loss of the vessel, all of her crew and personnel aboard and all of her cargo, and it appearing to the court that prior to the time of trial default had been duly entered of all persons having claims arising out of said disaster except those who had filed claims herein, and it further appearing that all claims for death of the crew and personnel aboard on file here had been settled out of court, the trial proceeded upon the sole remaining issues presented by the petition and the claims for loss of cargo, the petitioner being represented by is proctors, Erskine Wood, Esq., Stanley B. Long, Esq., Lofton L. Tatum, Esq., and C. Calvert Knutsen, Esq., the cargo claimants, Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company, being represented by John Gordon Gearin, Esq., and George B. Campbell, Esq., the cargo claimant, United States of America, being represented by Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Paul D. Hanlon, Esq., formerly Attorney, Department of Justice, and the claimant, The Dominion of Canada, being represented by Charles Howard, Esq., and evidence both oral and documentary having been introduced, and the petition and all claims in this cause remaining for decision being submitted, the Court now, after due deliberation thereon and consideration of extensive arguments and briefs of counsel, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That petitioner, States Steamship Company, in February 1951, purchased from the United States of America the SS Pennsylvania, formerly the Luxembourg Victory, a Victory-type vessel, Official Number 245,327, built for the Government by the Oregon shipyard and completed on April 5, 1944, with dimensions of 455 feet, 3-11/32 inches in length, with beam of 62.1 feet, and gross tonnage of 7,608 tons.

II.

That on January 5, 1952, the petitioner, as the owner and operator of the S.S. Pennsylvania, sailed said vessel (designated as Voyage VI), from the Port of Seattle for the Port of Yokohama via the Great Circle Route, as a common carrier for hire, having on board the cargo of the claimants which the vessel had received in good order and condition, and that during the course of said voyage the SS Pennsylvania sank during a storm in the Gulf of Alaska at a position of approximately 505 miles WNW of Seattle, Washington, and 535 miles SE of Kodiak, Alaska, with a total loss of the vessel, all of her crew and personnel and the total loss of all her cargo, including the cargo of the claimants.

III.

The storm, which had been designated as the Pennsylvania storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on

trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the Pennsylvania being her own unseaworthiness.

IV.

The contributory factors responsible for the sinking of the S.S. Pennsylvania are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steering systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water.

V.

That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at

the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.

VI.

That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability.

VII.

That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner.

Conclusions of Law

I.

The Court has jurisdiction of the petition and the claims of cargo interests under Rules 51 to 55 of the United States Supreme Court Admiralty Rules.

II.

That the petitioner has failed to prove due diligence to make the S.S. Pennsylvania seaworthy at the inception of the voyage upon which she sank by reason of

her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants.

III.

That the petitioner has proved that the unseaworthiness of the SS Pennsylvania at the inception of her voyage was without the knowledge or privity of the petitioner and is entitled to limit its liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954.

IV.

That the cargo interests are entitled to judgment against the petitioner for the amount of the pending freight in ratio to the amount of their respective claims, with interest at 6% together with their costs.

Let an interlocutory decree enter accordingly and if the parties cannot agree between themselves as to the damages and segregation thereof, the matter shall be referred to a commissioner to be appointed by the Court who shall ascertain the amount thereof and make report to the court in accord with the agreement of the parties made at the commencement of the trial.

Dated this 10 day of February, 1956.

/s/ Dave W. Ling,
Judge

[Endorsed]: Filed February 16, 1956.

Pertinent Parts of Carriage of Goods By Sea Act, 1936, 46 U.S.C.A. §§ 1302, and 1303(1)(a)(b)(c) and 1304(1) and (2)(a)(c)(d)(p) and (q)

§ 1302. DUTIES AND RIGHTS OF CARRIER

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1304 and 1305 of this title. Apr. 16, 1936, c. 229, § 2, 49 Stat. 1208.

§ 1303. RESPONSIBILITIES AND LIABILITIES OF CARRIER AND SHIP—SEAWORTHINESS

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

§ 1304. RIGHTS AND IMMUNITIES OF CARRIER AND SHIP—UNSEAWORTHINESS

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure

that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The Canadian Act, 1956 AMC, Pages 1250-1258 Sections 2, 3, and Rules, Article II, Article III, Section 1, (a)(b)(c) and Article IV, Section 1, and Section 2 (a)(c)(d)(p) and (q)

2. Subject to the provisions of this Act, the Rules relating to bills of lading as contained in the Schedule to this Act (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

RULES

ARTICLE II.

RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

ARTICLE III.

RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

ARTICLE IV.

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(c) perils, danger, and accidents of the sea or other navigable waters;

(*d*) act of God;

(*p*) latent defects not discoverable by due diligence;

(*q*) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

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No. 15131

In the

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

BRIEF OF APPELLANTS

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
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BRIEF OF APPELLANTS

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

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JURISDICTION

This proceeding was commenced by the filing of a petition for exoneration from or limitation of liability by States Steamship Company as corporate owner of the SS PENNSYLVANIA. The petition was filed in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was acquired under Rules 51-55 of the United States Supreme Court Admiralty Rules.

These appellants have appealed from that portion of the interlocutory decree of the District Court which limited their recovery to their proportionate share of the pending freight, and denied the full amount of their damages.

The jurisdiction of this Court was acquired under 62 Stat 929, 28 U.S.C.A. § 1292.

STATEMENT OF THE CASE

The SS PENNSYLVANIA on January 9, 1952, while on a voyage from the Port of Seattle, Washington, destined for the port of Yokohama, Japan, sank in the Gulf of Alaska at a position approximately 500 miles west northwest of Seattle, Washington. The vessel with all of her crew and cargo were lost.

The history of the vessel is briefly as follows: The vessel was a Victory ship built in 1944 by the Oregon Shipbuilding Company for the United States government. Between 1944 and January, 1951, the vessel was owned by the United States government and was operated in the Pacific area. During this period the vessel sustained numerous incidents of severe and extensive damage to its hull and frames due to heavy weather, collisions, and groundings. Repairs of these damages were made at times by complete replacement of the damaged plates, at other times by partial replacement of damaged plates and at times by merely restoring the old material to its original shape (Ex 147 and Tr 2391 through 2430 and 2439 through 2585).

By bill of sale effective February 17, 1951, the vessel was sold by the United States government to the States Steamship Company without warranty.

At the time States Steamship Company took title to the vessel it was provided with complete survey reports indicating past damages and repairs to the vessel.

Prior to its fatal voyage, the vessel, while owned and operated by States Steamship Company, made five voyages across the Pacific and back to the United States. On October 27, 1951, at the commencement of her Voyage 5, the SS PENNSYLVANIA sailed from the port of Long Beach, California bound for the Orient (Ex 69). During Voyage 5 on November 2, 1951, while proceeding in heavy weather with an air temperature of 54°, the vessel sustained a 22 foot crack in the main deck on the starboard side just forward of the midship house (Ex 44). On being advised of this crack by radio the States Steamship Company suggested to the Master by radio that he return to the closest and safest port, and the Master then proceeded immediately into Portland, Oregon (Tr 161).

The Head Operations Office of the States Steamship Company is located in Portland, Oregon (Tr 291-292). The Port Engineer and Acting Marine Superintendent of the Company, Mr. Lester Vallet, attended the vessel on arrival, surveyed the damage, prepared specifications for the repair of the damage and took complete charge of this repair operation (Tr 163).

The damage was also inspected by the American Bureau of Shipping and the Coast Guard, and the repairs were carried out by the Albina Engine & Machine Works (Tr 162). The vessel was not dry docked at this time, and only so much of the cargo was unloaded from the No. 3 hatch and from the deck of the vessel around the No. 3 hatch as was necessary to inspect and repair the 22 foot deck crack, and other damage in that *immediate area* (Tr 235 and 281). No tests of welds in the hull of the vessel or of other portions of the vessel except those in the immediate area of this damage were made by States Steamship Company at this time (Tr 268-269).

The 22 foot deck failure in the vessel sustained on Voyage 5 was classified as a Class 1 casualty, which has been defined by the Ship Structure Committee as one which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition (Tr 1864-1865) or one where the strength of the structure is so weakened that it would be in imminent danger of further failure (Tr 2770). This was the first Class 1 casualty suffered by a Victory ship in over 2,000 ship years experience (Tr 2766 et seq). (The Ship Structure Committee was appointed by the Secretary of the Treasury and was comprised of representatives from the Navy Department, Bureau of Ships, the United

States Coast Guard, the United States Maritime Commission and the American Bureau of Shipping. (Tr 2734))

While the vessel was in Portland for these repairs on Voyage 5, it was discovered by a crew member of the vessel that the emergency steering gear was not working properly (Tr 344). This condition was personally investigated by the Marine Superintendent, Mr. Vallet, and it was discovered that cargo in the No. 5 hold in the nature of army blankets and clothing had entered in around the steering shaft and wrapped around the shaft so as to make it difficult to turn. The shaft was freed up by removing this clothing (Tr 217 and 344), and no other measures were taken to prevent a reoccurrence (Tr 372-373).

The vessel continued Voyage 5 by sailing to the Orient from Portland on November 14, 1951, and completed this voyage upon her return from the Orient to Seattle, Washington. At Seattle, the vessel was placed in dry dock at Todd's Shipyard for a scheduled routine annual underwater body inspection. The vessel was dry docked from 2250 hours on December 21 to 1615 hours on Decembr 22, 1951 (Ex 44) The Marine Superintendent and Port Engineer of States Steamship Company did not personally go to Seattle for this drydocking (Tr 178) but in his place sent his Assistant Port Engineer, Mr. Harve Brenneke (Tr 331). Under the op-

erational organization established by States Steamship Company, Mr. Harve Brenneke, as Assistant Port Engineer, had complete authority with regard to inspection and repairs of the vessel in the absence of Mr. Vallet (Tr 241). Mr. Brenneke limited his examination and survey of the vessel at Seattle to the underwater portions of the vessel (Tr 1718-1719). The vessel had carried cargo back from the Orient to Seattle on the return trip of Voyage 5 (Tr 2102), and this cargo remained in the cargo holds of the vessel during the entire drydocking period (Tr 1161; Ex 44).

While the vessel was on dry dock, examination and surveys of the underwater body were conducted by the Coast Guard and the American Bureau of Shipping. Neither the Coast Guard representative (Tr 684) nor the American Bureau of Shipping Surveyor (Tr 769) received any special information concerning the vessel or instructions as to the type of inspection to be made either before or during their dry dock examination. The fact that the vessel had just suffered the first Class 1 casualty in Victory ship history was not disclosed to those who were to make the inspection.

On December 27, 1951, the vessel arrived at Vancouver, British Columbia (Tr 962). The lower holds of the vessel were prepared for the receipt of bulk grain, and its preparation included sealing off of the bilge

strainers in the lower holds with two layers of burlap (Ex 186, pp 6-10 and 22-23). After completing the loading of the grain cargo, the vessel departed from Vancouver on January 2, 1952, and returned to Seattle, Washington (Ex 44). The vessel arrived in Seattle on January 2, 1952, and docked at Pier 37 to load U. S. Army cargo (Tr 1165).

At some time prior to the vessel's arrival at Seattle, the States Steamship Company had offered certain space on the SS PENNSYLVANIA to the Army for carriage of Army cargo on Voyage 6 (Tr 2775). The space offered by the States Steamship Company included the entire deck space of the vessel (Tr 2130). This offering of space to the Army was the personal duty of Mr. Pitzer, the States Steamship Company Manager in Charge of the Operations Department.

On the basis of the space offered and the nature of the Army cargo to be shipped, the Army had prepared a prestowage plan (Tr 2117). The Army prestowage plan indicated that a cargo of corrosive acid in glass carboys, was to be stowed on the after deck in the wings of No. 5 hatch, and that a cargo of acetylene, in cylinders, should be stowed below deck (Tr 2120-2121 and 2128-2134). During the course of the loading of Army cargo aboard the vessel, the Master of the SS PENNSYLVANIA intervened and designated specific-

ally that the corrosive acid stowage location should be changed to the forward deck alongside No. 2 hatch (Tr 2686-2687). The acid cargo was stowed two tiers high alongside the No. 2 hatch (Tr 1004 and 991) and the acetylene was also stowed on the forward deck (Tr 117; 991).

At all times during the loading of the government cargo the States Steamship Company had in attendance aboard the vessel a regularly employed shore based supercargo, who was in charge of the loading of the vessel for States Steamship Company (Tr 1155-1156). The stowing of the corrosive acid on the forward deck was done sometime during the day of January 4, 1952 (Tr 1110, Ex 86). The supercargo reported the stowage of the acid in that location to the Seattle office of States Steamship Company on the day that it was so stowed (Tr 1166-1167).

In addition to the boxes of corrosive acid carried as deck cargo, the vessel carried on the forward deck twenty-six two wheel trailers (Ex 188). These trailers were stowed on the starboard side alongside No. 3 hatch (Tr 1005).

Crew members aboard the SS PENNSYLVANIA on Voyage 5 testified that the cross battens which were used to secure the forward hatches of the vessel were in a bent condition and as such were difficult to secure

and keep secure (Tr 2081-2082; 2094; 2100). There was no chafing gear aboard the vessel (Tr 307-308).

The vessel completed loading at Seattle for Voyage 6 on the morning of January 5, 1952, and cast off from Pier 37 shortly after 0800 on January 5th (Tr 739) for the Orient on what has been described as the Great Circle Route.

The Marine Superintendent of States Steamship Company knew that many of the Masters of the States Steamship Company decided to take the Great Circle Route when west bound to the Orient (Tr 238). In particular the custom of Captain Plover of the SS PENNSYLVANIA in his choice of the northern or Great Circle Route was known to the States Steamship Company (Tr 506).

The only evidence as to weather and sea conditions actually encountered by the SS PENNSYLVANIA is contained in the radio messages received from the vessel (Ex 127). The wind velocity reported by the vessel was a wind of Force 9, Beaufort Scale, with very high seas. Between January 8 through January 10, 1952, there were approximately 17 ships reporting weather conditions from the general storm area in which the SS PENNSYLVANIA was lost. The ships closest to the SS PENNSYLVANIA, which proceeded toward her for the purpose of attempting rescue, sustained no sub-

stantial damage. No vessel within the storm area other than the SS PENNSYLVANIA was lost, or even sustained major heavy weather damage. (Ex 135, p 44; Ex 123, pp 30 and 31; Ex 146(8), pp 47 and 48; Ex 47, pp 51 and 52; and Tr 1658).

The radio messages from the SS PENNSYLVANIA (Ex 127), establish these facts:

The vessel sustained a crack down the port side between frames 93 and 94;

The crack started in the sheer strake and ran down about 14 feet;

Sea water entered the engine room of the vessel through this crack;

The vessel sustained a failure or breakdown of its steering system and for a time the vessel was completely unable to steer by any method in heavy seas then existing;

If the crew could not fix the steering gear the vessel would need immediate assistance;

The vessel was taking water in No. 1 hold;

The deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and the No. 2 hatch was open and full of water.

The significant radio messages from the vessel are set out in full context in Appendix A to this Brief.

Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company had issued policies of insurance on substantial portions of the cargo and upon payment of the loss to the owner of the cargo became claimants to the proceeding. The Dominion of Canada was the owner of certain cargo lost with the vessel.

On January 23, 1952, the States Steamship Company, as owner of the SS PENNSYLVANIA, filed its petition for exoneration from or limitation of liability in connection with the loss of the vessel and its cargo. These appellants, being underwriters of certain cargo lost with the vessel, and The Dominion of Canada, filed their claims and answers. The case was tried between July 13, 1954 and August 10, 1954. February 10, 1956, the trial court entered its Findings of Fact and Conclusions of Law (Tr 72).

In summary, the Findings and Conclusions were as follows:

> The storm in which the SS PENNSYLVANIA was lost was not of such a magnitude as to constitute a peril of the sea;
>
> The proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness;

The failure and difficulties outlined in the vessel's radio messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking;

The vessel was unseaworthy by reason of these factors at the inception of her voyage;

The evidence was insufficient to show that the petitioner had used due diligence to make the vessel seaworthy at the inception of her voyage, but the evidence was sufficient to show that the unseaworthy condition of the vessel at the inception of the voyage was without the privity or knowledge of the petitioner.

On February 16, 1956, the trial court entered an interlocutory decree denying the petition for exoneration from liability but granting the petition for limitation of liability and limited the recovery of these appellants to their proportionate share of the vessel's pending freight.

The appeal herein is from that portion of the interlocutory decree which allows the vessel owner to limit its liability to the amount of the pending freight. The sole question so presented is whether or not the proven unseaworthy conditions of the vessel and the proven failures to use due diligence to discover and correct

those unseaworthy conditions were within the privity or knowledge of the managers and superintendents of the States Steamship Company within the meaning of the Limitation of Liability Act, 46 U. S. C. A. § 183.

SPECIFICATIONS OF ERRORS RELIED UPON

I. The District Court erred in making and entering its Finding No. VII, which reads as follows:

> "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

II. The District Court erred in making and entering its Conclusion No. III, which reads as follows:

> "That the petitioner has proved that the unseaworthiness of the SS Pennsylvania at the inception of her voyage was without the knowledge or privity of the petitioner and is entitled to limit its liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954."

III. The District Court erred under its Interlocutory Decree, dated February 10, 1956 and entered February 16, 1956, in granting the petition of appellant States Steamship Company for limitation of liability to the amount of the pending freight on the SS Pennsylvania on January 9, 1952.

IV. The District Court erred in failing to find that the unseaworthy condition of the vessel at the inception of her voyage was within the privity and knowledge of appellant States Steamship Company.

V. The District Court erred in failing to find and conclude that appellant States Steamship Company has failed to sustain the burden of proving that the unseaworthiness of the SS Pennsylvania at the inception of her voyage, resulting in the loss of the said vessel and all her cargo, was without the privity or knowledge of the said appellant.

VI. The District Court erred in failing to find and conclude that appellants, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, are entitled to recover the full amount of its damages arising from the loss of cargo aboard the SS Pennsylvania,

and in failing to enter judgment and decree in favor of these appellants for the full amount of said damages with interest thereon, together with costs.

SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE PETITION TO LIMIT LIABILITY TO THE VALUE OF THE PENDING FREIGHT.

A. The Burden of Proving Lack of Privity was on the Vessel Owner, States Steamship Company.

B. The Burden of Proof is on the Vessel Owner, States Steamship Company, to Establish Lack of Knowledge or the Means of Knowledge on the Part of Its Superintendents as to the Vessel's Unseaworthiness.

C. Petitioner as Owner of the Vessel Did Not Undertake to Sustain its Burden of Proof Upon the Issue of Privity, but on the Contrary It Disregarded Limitation and Relied Solely Upon an Asserted Lack of Liability.

D. Privity or Knowledge of any Shoreside Manager or Superintendent who Supervised any Phase of the Business Out of Which the Loss Occurred is the Privity or Knowledge of the Corporate Owner.

E. Privity or Knowledge as to Any One of the Contributing Causes of the Loss is Enough to Prevent Limitation.

F. The Privity and Knowledge of the Vessel Owner has been Established with Regard to Unseaworthy Steering Equipment.

G. The Privity and Knowledge of the Vessel Owner has been Established with Regard to the Unseaworthy Hull of the Vessel.

H. The Privity and Knowledge of the Vessel Owner has been Established with Regard to the Unseaworthy Conditions Resulting in the Opening of Number 2 and 3 Hatches.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE PETITION TO LIMIT LIABILITY TO THE VALUE OF THE PENDING FREIGHT.

A. The Burden of Proving Lack of Privity Was on the Vessel Owner, States Steamship Company.

The burden of proof as to privity or knowledge under the Limitation of Liability Act, 46 U.S.C.A. § 183, is upon the petitioning shipowner. To be entitled to limitation of liability, the shipowner must

prove the negative proposition of the absence or lack of his privity or knowledge.

The CLEVECO, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944) affirmed 154 F2d 605 (6th Cir., 1946);

The SILVER PALM, 94 F2d 776 (9th Cir., 1937); 1937 AMC 1462;

The VESTRIS, 60 F2d 273 (D.C.S.D.N.Y., 1932); 1932 AMC 863;

The EDMUND FANNING, 105 F Supp 353 (D.C.S.D.N.Y., 1952); 1952 AMC 1147;

Benedict on Admiralty, 6th Ed., Vol. 3, p. 378.

B. The Burden of Proof is on the Vessel Owner, States Steamship Company, to Establiish Lack of Knowledge or the Means of Knowledge on the Part of Its Superintendents as to the Vessel's Unseaworthiness.

The decisions under the Limitation of Liability Act make it clear that actual knowledge of the unseaworthy conditions is not necessary to prevent a shipowner from limiting his liability.

The rule has been stated by this Court as follows:

> "In proceedings for limitation, the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge such an agent is its alter-ego." *The SILVER PALM*, supra, 94 F2d 776 (9th Cir 1937) at p. 780.

See also:

THE FRANCESCA, 19 F Supp 829, at p 833, (D.C.W.D.N.Y., 1937); 1937 AMC 1006:

"Knowledge means personal cognizance, or *means of knowledge* of which the owner is bound to avail itself * * *." (Emphasis supplied)

In Re Great Lakes Transit Corporation, 81 F2d 441, at p 444, (6th Cir., 1936):

"The statute does not require that knowledge be actual, it may be imputed if someone in charge for the owner had general authority to act for him, and *by the exercise of ordinary care could have discovered the fault.*" (Emphasis supplied)

The ARGENT, 1940 AMC 508, at p 509 (D.C.S.D.N.Y., 1915):

"It would, however, be a very easy matter for an owner to shelter himself behind an actual ignorance if lack of personal knowledge always constituted a good defense to the extent of the protection accorded by statute. If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners, would be at a premium. Such assumption of ignorance would be peculiarly easy on the part of corporate owners. Corporate owners have of late years greatly multiplied, and it is accordingly found that the doctrine of imputed knowledge and imputed privity has grown to meet the demands of business.

"In this case I think it conclusively proven that no officer of the petitioning corporation knew that the Argent maintained an unlawful light but for the matter of that they did not know whether she maintained a light at all, they did not regard it as any part of their business to ascertain whether that humble vessel was complying with the law or violating it every day."

* * *

"As long ago as *Republic*, 61 Fed. 109, knowledge of what owners could have seen if they had looked was imputed to them. * * *"

Austerberry v. U. S., 169 F2d 583 at p 594, (6th Cir., 1948):

"* * * the burden was upon the appellee to show that it had no privity or knowledge * * *. To sustain the burden of proof that is imposed in cases like this it may be observed that it is not sufficient to show that operations and care of the vessel were placed in the hands of men of experience in such matters * * *."

C. Petitioner as Owner of the Vessel Did Not Undertake to Sustain Its Burden of Proof Upon the Issue of Privity, but on the Contrary it Disregarded Limitation and Relied Solely Upon an Asserted Lack of Liability.

Despite the burden of proof which rests throughout on the petitioner, we shall in subsequent portions of this brief demonstrate privity and knowledge on the

part of the vessel owner respecting the unseaworthy conditions which brought about the loss of the vessel.

Our approach to the subject of privity and the failure of petitioner to sustain its burden of proof on this issue is not simplified by the fact that petitioner at trial took the position that there was no liability, i. e., no unseaworthiness or faults on the part of petitioner and therefore there was no necessity of going into the question of privity. As petitioner stated in its trial brief, "We shall not discuss privity, except in the abstract." And again in its answering trial brief (in an unsuccessful attempt to invoke the defense of a Peril of the Sea), "You cannot, unless you are in the confidence of God himself be privy to a storm."

At the close of petitioner's opening statement one of its proctors represented to the Court that the substance of its case as reviewed to that point concerned the question of liability. It was admitted that if a lack of due diligence was shown (as was later found by the trial court) the burden would shift to the vessel owner to prove lack of privity or knowledge on the part of its "managing or executive officers", but petitioner did not expect to reach that point (Tr 125).

In acknowledging this burden of proof, petitioner recognized the well settled rule applied in *The CLEVECO*, supra, 154 F2d 605 (6th Cir., 1946) and

other admiralty decisions considering this issue. However, it appears that no serious attempt was made by petitioner to sustain this burden in view of its position throughout the trial that there was no liability.

This is borne out by the evidence presented by petitioner with the obvious purpose of supporting its petition for exoneration, which issue has been decided adversely to the petitioner.

At the close of petitioner's case in chief petitioner's proctor stated to the Court (Tr 1753):

> "And also on the second issue, that is privity, of course we reserve the right to go into that when the occasion arises."

In view of the record it is manifest that petitioner at the close of its case did not undertake to introduce *any* evidence to sustain its burden.

The evidence subsequently introduced by petitioner on rebuttal falls far short of constituting satisfactory or other type of evidence supporting lack of privity.

J. R. Dant, Vice President and General Manager of the steamship company (Tr 2618-2619), testified that neither he nor any other member of petitioner's Board of Directors participated in any direct manner in the operation of the company's vessels and at the time of the loss of the SS PENNSYLVANIA and in" * * * the

months prior thereto * * *", Mr. Vallet as Marine Superintendent was in complete charge of the upkeep, repair, maintenance and supplying of the vessel. Mr. Dant further testified that Mr. Vallet was in general charge of making inspections and repairs and it was not necessary for Vallet to obtain authorization from petitioner's Board to make extensive repairs to the vessel (Tr 2624).

This testimony of Mr. Dant has nothing to do with the question of privity except perhaps to confirm the very extensive control and authority vested in Vallet as Marine Superintendent. The evidence was conclusive that not only was Mr. Vallet in privity with the unseaworthiness, faults and defects which brought about the loss of the vessel but that Mr. Vallet's personal neglect and gross disregard for principles of safety occasioned the loss of this vessel and her entire crew. Mr. Dant as the titular head of the company, perhaps in a desire to absolve himself from all connection with this tragedy, attempted to place the blame on the Marine Superintendent but in doing so he actually established that Vallet's privity and knowledge and negligence should be imputed to the corporate vessel owner.

The testimony of William H. Pitzer (Tr 2774-2776) adds or detracts nothing from petitioner's position for

he merely stated that he was head of petitioner's operating department in charge of the handling of the cargo and preplanning the loading of the vessel. Aside from preplanned loading of the cargo, he testified that he had nothing to do with the laying out, loading, stowing, or lashing of the cargo in the SS PENNSYLVANIA. This testimony in no way refutes the privity and knowledge of Pitzer as to defects in the planning of the cargo stowage, or its loading, stowing, or lashing. As hereafter reviewed in this brief, individuals under Pitzer's direct supervision and control attended the loading, stowing and lashing of the cargo.

The testimony of these two witnesses represents the only effort in the entire record which can be in any way identified with petitioner's burden of proving lack of privity, knowledge or means of knowledge respecting unseaworthiness, faults and negligence. The weak character of such testimony, i. e., Dant and Pitzer, falls far short of the evidence required to sustain this burden of proof.

D. Privity or Knowledge of Any Shoreside Manager or Superintendent Who Supervised Any Phase of the Business Out of Which the Loss Occurred is the Privity or Knowledge of the Corporate Owner.

Since the owner of the SS PENNSYLVANIA is a corporation, the question arises as to which agents and

employees of the corporation are sufficiently high in the managerial echelons so their knowledge or privity will be attributed to the corporation and thereby defeat the corporate vessel owner's right to limit its liability. The general rule is stated in *Coryell v. Phipps*, 317 US 406, 87 L ed 363, 1943 AMC 18, where the court held that privity or knowledge of any shoreside "executive, officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred," is sufficient to destroy the vessel owner's right to limitation. See also *The SILVER PALM*, supra, 94 F2d 776 (9th Cir., 1937)

The following personnel of the States Steamship Company are managers or superintendents whose scope of authority in the various instances to be cited is sufficiently broad to constitute privity or knowledge of the corporation.

1. Mr. Vallet was acting in the dual capacity of Marine Superintendent and Port Engineer for the company. As Port Engineer he was in charge of all maintenance and repair of all vessels. As Marine Superintendent he was in charge of the Marine Department, which in addition to the maintenance and repair of the vessel was also charged with the obtaining of personnel and officers for the ships, maintaining discipline

on the vessels, and also operating and stowing the ships (Tr 140). In this position of complete authority, Vallet, without question, occupied a status in which his privity and knowledge must be attributed to the corporate owner for purposes of defeating limitation. As stated in *The CLEVECO*, supra, 154 F2d 605, (6th Cir., 1946) at p. 613:

> "Where a corporation is the owner of a vessel, the knowledge of the marine superintendent having general control and direction of its business is the knowledge of the corporate owner of the vessel. *Eastern S. S. Corporation v. Great Lakes Dredge and Dock Co.*, 1 Cir., 256 F. 497; and, within the section of the statute limiting liability knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it."

See also, *In Re Great Lakes Transit Corporation*, 81 F2d 441 (6th Cir., 1936);

In Re Jeremiah Smith & Sons, Inc., 193 F 395 (2nd Cir., 1911);

In Re New York Dock Company, 61 F2d 777 (2nd Cir., 1932).

2. Mr. Harve Brennecke, during the months of December, 1951 and January, 1952, just prior to the sail-

ing of the SS PENNSYLVANIA on its fatal voyage, was the No. 1 man under Vallet and carried the title of Assistant Port Engineer. In Vallet's absence Brenneke took Vallet's place and performed his duties (Tr 241). When the vessel was drydocked at Seattle, just prior to her departure on the fatal Voyage 6, she was attended by Mr. Brenneke. Vallet did not attend the vessel personally at this time, but in his place dispatched his Assistant to inspect the vessel and Mr. Brenneke was, accordingly, charged with complete authority over the vessel's inspection and any needed repairs at the conclusion of its Voyage 5 and prior to the commencement of Voyage 6. Under the decisions of the Admiralty Courts, this scope of authority clearly brings Brenneke within that group of corporate superintendents whose privity or knowledge will defeat limitation for the vessel owner.

As it was stated *In Re P. Sanford Ross*, 204 F 248 (2nd Cir., 1913), at p. 251:

> "The real test is not as to their being officers in a strict sense, but as to the largeness of their authority."

See also *POCONE*, 159 F2d 661 (2nd Cir., 1947), 1947 AMC 306, where the court held a corporation in privity with the negligence of a port engineer who

worked under a traffic manager, who in turn worked under the corporation's general agent. See also *The VESTRIS*, supra, 60 F2d 273 (D.C.S.D.N.Y., 1932)

3. Mr. William H. Pitzer was the head of the Operating Department for States Steamship Company in charge of the handling of the cargo (Tr 240, 2774), and had such authority that his privity and knowledge concerning any defective situation as to cargo or the planning of cargo stowage would constitute privity or knowledge of the corporation.

The EDMUND FANNING, supra;

Wilbur, et al v. Williams S. S. Co., 9 F2d 940 (D.C.N.D. Cal. S.D., 1925)

4. Mr. Paul A. Matson was in charge of the States Steamship Company's Seattle Operating Office (Tr 240. The States Steamship Company supercargoes, who were aboard the vessel supervising the loading of the cargo for the final voyage in January, 1952, made daily reports to Matson's office as to the details of the stowage of the cargo (Tr 1166). Under the cases cited above to establish the privity of the steamship company with regard to Mr. Pitzer, Matson's privity and knowledge must also be considered that of the corporation.

In *The EDMUND FANNING*, supra, the corporate owner was held in privity as to improper cargo stowage on the basis of knowledge of the unseaworthy conditions on the part of a shore captain at a port along the vessel's route, and again in *Wilbur, et al v. Williams S. S. Co.*, supra, limitation was denied because of knowledge of improper cargo stowage on the part of the ship owner's general agent, who supervised and approved stowage at the regular port of call.

The trial court found as a matter of *fact* that the *SS PENNSYLVANIA* was at the inception of her last and fatal voyage unseaworthy in many particulars which combined to cause the vessel's loss. The court also found as a matter of *fact* that petitioner as corporate owner of the vessel failed to exercise due diligence with respect to her unseaworthy condition. Based on such a finding the trial court necessarily denied the petition for exoneration, but held the corporate owner entitled to limit its liability upon a finding that it was not in privy with the unseaworthiness.

The evidence conclusively demonstrates that Vallet as Marine Superintendent — and as we have seen, the *only* supervisory employee who had charge of *all* phases of the vessel's care — had knowledge or means of knowledge of the unseaworthy condition in every respect as found by the trial court in entering

its initial finding of liability. We shall demonstrate that Vallet was personally guilty of neglect and default in sending and permitting the vessel to sail in a known unseaworthy condition.

The only possible premise on which the court could have granted limitation would be in our opinion based upon an apparent misapprehension that the privity and knowledge of the Marine Superintendent is not imputable to the corporate shipowner — a proposition which we have shown has been uniformly decided to the contrary by every admiralty decision which has considered the issue.

E. Privity or Knowledge as to Any One of the Contributing Causes of the Loss Is Sufficient to Prevent Limitation.

The trial court *found* that *all* of the difficulties mentioned in the radio messages, which comprise the dying declarations of the vessel, contributed to and caused her sinking, and found that all of the faults, failures, breakdowns and difficulties, together with the crack sensitiveness of the vessel to cold weather and heavy seas were factors of unseaworthiness which proximately caused the loss.

The rule is well established in admiralty that when more than one cause contributes to cargo damage or

loss, and the owner is responsible for only one of the causes, the owner to free itself from liability for the entire damage must carry the *severe burden* of proving exactly how much loss or damage was not caused by its wrongdoing. *The VALLESCURA*, 293 US 296, 79 L ed 373; *POCONE*, 159 F2d 661 (2nd Cir. 1947), 1947 AMC 306.

As a correlary to this rule: If several causes contribute to a loss and the owner is in privity with one or more of the causes, he must, to escape liability, carry what would be in this case the impossible burden of proving that the loss was not caused by any unseaworthiness with which he was in privity. This rule appears to be recognized by the court in *Lord v. Goodall Steamship Company*, 15 F Cas No. 8506 (Circuit Court D. Calif., 1877), at p. 887:

> "As used in the statute, the meaning of the words 'privity or knowledge', evidently is a personal participation of the owner in some fault, or act of negligence, causing *or contributing to the loss*, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or *contribute to the loss*, without adopting appropriate means to prevent it." (Emphasis supplied)

F. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Steering Equipment.

Radio traffic from the stricken vessel tells us—and the court so found — that she suffered a failure or breakdown of her steering system, as for a considerable period of time, buffeted by the storms and winds of a typical North Pacific winter storm, she was unable to steer by *any* method.

The pounding of the vessel by the severe storm when she was unable to steer compelled the court to find that the steering failures were factors of unseaworthiness proximately causing her sinking. The court also found that the evidence was insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy.

We shall now prove that failure of the steering systems rests upon the shoulders of one man—Vallet, the Marine Superintendent.

Since the vessel sustained failures of all steering systems, and for a time could not be steered by any method, it is necessary to examine the evidence relative to the emergency system as well as the main steering system. While the vessel was at Portland, Oregon for repair of the 22 foot deck crack sustained during Voyage 5 in November 1951, it was discovered that

the shaft of the emergency steering system was jammed where it passes through No. 5 hold. Such jamming was caused by a cargo of army blankets and clothing shifting against the shaft and entering in around the shaft so as to make it difficult to turn (Tr 169). Vallet personally inspected this unseaworthy condition, and testified that the only corrective measure taken was the removal of the cargo of clothing and blankets away from the shaft (Tr 169). No protective shield or guard was installed and no other action was taken to prevent a reoccurrence of this difficulty should the cargo shift again in the future (Tr 372). As he personally saw this defective condition and took charge of the sole correction made, it is thereby conclusively established that the lack of due diligence to permanently correct this unseaworthy condition in the emergency steering system was his *personal* negligence.

Turning to the main steering system, a review of the evidence establishes that the main steering system on the SS PENNSYLVANIA was a complicated combination of electric motors, moving parts, springs, hydraulic pumps, copper hydraulic tubing, etc. (Tr 677-680). Since the radio messages established that this steering system failed, the burden was then on the petitioner to show due diligence to maintain the entire system in seaworthy condition.

In connection with such critical items as steering equipment, stout, perfect ship's tackle is vital to safe navigation, and where failure of such items occurs, Admiralty has traditionally held the shipowner to the most *convincing* proof of due diligence.

Judge Augustus Hand has made a very able statement of the law in this field in *The WOODMANCEY*, 1925 AMC 1059 [reversed on other grounds, 18 F2d 79 (2nd Cir., 1927), 1927 AMC 628], at p. 1060:

> "Stout, perfect ship's tackle is vital to safe navigation and most convincing proof must be offered to sustain the defense of inevitable accident. * * * Care in looking after equipment and detecting defects which might render a tug helpless in dangerous waters should be established by completely convincing evidence. * * *"

Further illustration of the exacting standards of inspection and upkeep of steering equipment imposed on shipowners by the courts may be found in *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1945), 1946 AMC 178, 188; *The PHOEBUS-MARAVI*, 70 F Supp 817, (D.C.S.D.N.Y., 1946), 1947 AMC 90; and *New York Marine No. 2*, 33 F2d 272 (2nd Cir., 1929).

In applying standards of inspection the time at which a thorough inspection of a vessel should be made

was recognized in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH, et al*, 109 F Supp 781 (D.C.S.D.N.Y., 1951), [affirmed 200 F2d 908 (2nd Cir., 1953)] where the District Court aptly stated, at p. 792:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Something might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

Faced with this heavy burden of proof in connection with the failure of the main steering system, the owner, in this case, knowing full well the vessel would by necessity traverse waters which tax the weathering qualities of a vessel to the utmost, where even a momentary failure of the vessel to steer might well be disastrous, failed to offer even one word of testimony to indicate that internal moving parts were ever inspected for wear during the entire history of the vessel.

The only evidence relative to the steering system was as follows: The U. S. Coast Guard inspectors conducted a dockside operating test of the main steering system in August, 1951, some five months prior to the fatal voyage. This dockside test consisted of turning the wheel in the pilot house and observing in the steering

engine room aft to see that the steering engine operated, and that the rudder indicators responded (Tr 658). During this same inspection period, in August, 1951, an American Bureau of Shipping Inspector also made an *external* examination of the steering parts. The Coast Guard inspector testified that the steering engine and the hydraulic pumps for the steering system were not opened up, and the internal parts were not inspected at the time of this August, 1951 inspection (Tr 689). A qualified Coast Guard Inspector testified that the Coast Guard does not require the opening up of the steering pumps on annual inspection but does require such an internal examination for the four year survey Tr 687).

It is significant that petitioner failed to introduce any evidence that such an internal examination had ever been conducted on the ship, for, notwithstanding an otherwise complete list of surveys which were made available at the trial, petitioner did not introduce even one four-year survey. We can therefore assume that no four-year survey was ever conducted and we can conclusively assume that the steering pumps were never internally inspected. How can the petitioner claim that it did not have the means of knowing that the steering pumps had not been inspected? The vessel was eight years old.

The only other evidence relative to the steering system concerned inspections of the steering gear made from time to time during Voyage 5 by the man on watch oiling the steering engine (Tr 351). It is clear from this testimony that these inspections were mere external observations of the visible parts of the engine at sea while the vessel was operating, and as the Court stated in *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F2d 194 (D.C.S.D.N.Y., 1927), at p. 197:

> "If a vessel owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo on board, instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal."

There is no other evidence of inspection of the steering equipment, and there is no evidence of any inspection of internal parts of the steering engine or gears or equipment. There was no evidence of any maintenance or replacement of steering equipment during the entire history of the vessel.

An illustration of the failure of proof with regard to inspection and maintenance of the steering system may be found in an examination of the record relative to just one important part of this complicated system. The principal steering system is a telemotor system

consisting of heavy copper piping through which a non-freezing liquid, free of air, runs to bring pressure on rams and turn the rudder (Tr 678). This copper piping runs from the wheel house to the steering engine room (Tr 678). The distance from the bridge or wheel house to the steering engine room aft is 200 to 250 feet (Tr 659). There was, therefore, 200 to 250 feet of copper tubing which had to be air tight and leak free at all times, and there is not one word of testimony to establish that any part of that tubing, not even one inch thereof, was ever examined for wear, cracking or corrosion during the entire eight year history of the vessel.

From the foregoing, it is clear that the Court's finding of failure to prove due diligence to make the steering system seaworthy is unavoidable. Just as clear, however, the finding by the Court of no privity or knowledge on the part of the owner is erroneous. The finding of lack of due diligence on this point is based on a failure to prove any proper inspections or *any* inspection systems or maintenance programs.

Mr. Lester Vallet had complete charge of maintenance and repair on the vessel (Tr 140). Vallet, in all his lengthy testimony (Tr 138 through 316) failed to mention any program of periodic inspection or repair and replacement of parts relative to the steering equip-

ment. If he had testified that he delegated inspection of the copper tubing or the internal working parts of the steering equipment or pumps to some other person, then these appellants would have had an opportunity to cross examine and determine whether or not the delegated person was qualified, and to determine whether or not he had exercised due diligence in his delegation, *The ERIE LIGHTER*, 250 F 490 (D.C.D.N.J., 1918), but the proof did not even get to that point. Vallet did not even allege any delegation, and the responsibility therefore remains with him. The failure to inspect these parts or to have them inspected was his personal negligence, and his negligence is the negligence of his employer. *In re New York Dock Company*, 61 F2d 777 (2nd Cir., 1932).

G. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Hull of the Vessel.

Another contributory factor responsible for the sinking of the vessel was a crack down the port side of the vessel between frames 93 and 94 starting in the sheer strake and running down about 14 feet through which sea water entered the engine room of the vessel. This defect was a factor of unseaworthiness which existed at the inception of the voyage, and the court found that petitioner failed to prove due diligence with

respect to this unseaworthiness. The failure to exercise due diligence to discover this defect was the personal failure of Mr. Vallet.

Vallet was the man in the States Steamship Company organization with such engineering knowledge and experience that he had knowledge or the means of knowledge as to this vessel's crack sensitiveness to low temperature and heavy weather.

At the time this vessel was purchased by States Steamship Company from the government, the complete past history of the vessel, including reports of serious and extensive damage to hull and frames, was made available to Mr. Vallet. Expert testimony introduced at the time of trial establishes the fact that when steel, of the characteristics used in the construction of the SS PENNSYLVANIA, is indented to any serious extent, the steel becomes subject to a condition known as "strain aging" (Tr 2427-2428). Once steel is strain aged, the temperature at which that steel will crack is a much higher temperature than before the strain aging occurred (Tr 2413-2414). Vallet was bound to know these facts, which were well known in the shipping industry prior to 1952, and were set forth in a publication entitled the "Welding Journal" as early as 1948 or 1949 (Tr 2438-2439). Vallet testified that he was familiar with the report of the Ship Structure

Committee (Ex 189) in connection with welded steel vessels, and had read this report prior to the sailing of the SS PENNSYLVANIA on Voyage 6 (Tr 209). This report contains findings of an expert body to the effect that serious fractures in welded steel vessels have usually occurred with low temperatures existing (Ex 185, p 9). This report further indicates that vessels which once have had a Class I casualty are more likely to sustain another Class I casualty (Ex 185).

It is admitted that the Voyage 5 fracture was a serious Class I casualty and Mr. Vallet, who alone in the managerial heirarchy of petitioner, had charge of inspection and repair of the vessel, felt that a thorough examination should be made of the vessel.

> "Q. When there was a serious crack, then that meant to you, did it not, that a thorough examination must be made of that vessel?
>
> A. Yes." (Vallet Tr 272).
>
> Q. When it comes to making an inspection of a hull, and I am talking about a detailed inspection, you would require, first of all, I understand, Mr. Vallet, that the vessel be *completely unloaded?* (Emphasis supplied)
>
> A. That is right.
>
> Q. And it should be on dry dock?
>
> A. For a complete inspection, yes.
>
> Q. For a complete inspection?
>
> A. Yes." (Vallet Tr 226)

Vallet also testified that a detailed hull inspection would involve going inside the vessel and examining *all the welds on the inside* (Tr 229). Vallet admitted testifying as follows in his deposition:

> "Q. How long would it take you to make a detailed and thorough hull inspection of the vessel?
>
> A. It would take about four or five days." (Vallet, Tr 227)

In his above testimony Mr. Vallet established a standard of care for inspecting the SS PENNSYLVANIA after she had sustained a Class I hull fracture during Voyage 5. However, no hull examination even approaching the standards prescribed by Vallet was made at the time repairs to the fracture were attempted during Voyage 5 or in the course of the drydocking at the conclusion of Voyage 5.

While the vessel was at Portland, Oregon for repair of the 22 foot crack in November, 1951, the vessel was not dry docked, and only so much cargo was removed from the No. 3 hold and No. 3 deck area as was necessary to repair and inspect the immediate area of the crack (Tr 235, 281). After this very limited inspection, Vallet sent the vessel to the Orient and back, and the next opportunity for a thorough inspection arose during the vessel's annual dry docking at Seattle in December, 1951.

Again the record demonstrates that Vallet failed to carry out his responsibility as the man in charge of maintenance and repair, and as the man who knew the significance and seriousness of the ship's prior Class I casualty. *He failed* to direct a thorough examination of the vessel's hull, although according to his own testimony, such an examination, conforming to specific standards prescribed by him, should have been made following the 22 foot deck plate fracture sustained on Voyage 5. *He failed* to attend the vessel in Seattle personally and gave his Assistant Port Engineer, Mr. Brenneke, no specific instructions for a thorough examination of the vessel. As a result, Mr. Brenneke limited the scope of his examination of the vessel to the usual routine underwater body examination which had been scheduled prior to the major deck plate fracture sustained on Voyage 5. The examination made by Mr. Brenneke was entirely without reference to or with consideration of the Class I casualty sustained on the voyage which the vessel had just concluded (Tr 1718-1719), although this was the first Class I casualty ever sustained by a Victory ship.

At the conclusion of its Voyage 5, the vessel was also examined, when dry docked in Seattle, Washington, by representatives of the American Bureau of Shipping and the U. S. Coast Guard for their own pur-

pose. However, prior to or during the time of their dry dock inspection, the inspecting personnel of these organizations had received no information concerning the recent Class I casualty to this vessel (Tr 684-685; 769). They were not advised of the serious damage sustained by the vessel on Voyage 5 or given any instructions or information which would guide and determine the extent of a hull inspection consistent with standards prescribed by Vallet.

It is obvious that the examinations by these representatives of other organizations could have no value for the purpose of relieving States Steamship Company's duty to exercise due diligence, particularly when vital information affecting the nature and extent of proper inspection was withheld from inspecting personnel.

The duty to exercise due diligence is to the vessel and not in the obtaining of certificates. *Bank Line, Limited v. Porter*, 25 F2d 843 (4th Cir., 1928); *The ABBAZIA*, 127 F 495 (D.C.S.D.N.Y., 1904); *The FELTRE*, 30 F2d 62 (9th Cir., 1929) and *The NINFA*, 156 F 512, 525 (D.C.D. Ore., 1907).

Furthermore, there is no indication that Vallet delegated inspection duties to these representatives of outside organizations as he testified that the company relied upon its own examinations (Tr 231 and 309).

Utterly no effort was made by Vallet, or his assistant Brenneke, to utilize the opportunity of the dry dock inspection at the conclusion of Voyage 5 as an occasion for a thorough inspection designed to determine the effect of the Voyage 5 Class I hull fracture upon the structural integrity of the vessel's hull, although this occasion was the last opportunity to provide the ship with the degree of inspection prescribed by Vallet's own standards prior to the vessel's departure on its fatal voyage.

Vallet's personal neglect in failing to inspect the ship is all the more glaring when we find that petitioner prior to the vessel's fatal voyage advertised (Ex 154-A, 154-B) an estimated time of arrival in the Orient which would have necessitated the Great Circle Route (where violent storms, low temperatures, and mountainous seas were to be anticipated) at an *estimated speed of fifteen knots* (Tr 1205-1206), or full speed ahead or top speed for a Victory ship. That Vallet should have known something was wrong with the vessel is borne out by a consideration of the weather conditions surrounding the Class I casualty on the preceding voyage. The air and sea temperatures were both relatively high, the air temperature being 54° F., the water temperature being 60° F. The weather conditions were not unusually severe and most certainly not as severe as the antici-

pated weather of the fatal voyage. Vallet knew "the highest incident of fracture occurs under the combination of low temperatures and heavy seas." See Design and Methods of Construction of Welded Steel Merchant Vessels, Section 8, finding (g), p. 9 (Ex 185) with which Vallet admitted familiarity. The reason for Vallet's refusal to have the vessel properly inspected at the conclusion of Voyage 5 is found in his own words (Tr 219 to 220):

> "Q. That is not my question. Were you or were you not in a hurry to get the vessel in and out of the dry dock at Todd's?
>
> A. No more than any other time.
>
> Q. I take it, then, that you are always in a hurry?
>
> A. That is—we are in the business of operating a ship with the least amount of delay.
>
> Q. That is right, just push them through?
>
> A. Sure."

In any search for other incipient cracks which might have resulted from the unusual stresses and strains placed upon the vessel during Voyage 5 when the 22 foot deck crack appeared, the most important place for examination was not the underwater portion of the ship. Mr. David Brown, an expert called by the owner, testified that the majority of cracks on the Victory type vessels occur in the main deck, which is the strength

deck within the midship portion of the vessel (Tr 2777). Brenneke, uninstructed as to the special and thorough examination required, testified that he confined his examination to the underwater body portion of the vessel (Tr 1717). There is no indication that Brenneke examined the decks or interior of the vessel in any way, or any portion of the hull above the water line.

To sum up the evidence supporting the trial court's findings of a lack of due diligence, as it applies to the hull inspections, the vessel was never given a thorough hull examination subsequent to the Class I casualty on Voyage 5 even according to Vallet's own standards. The vessel was never examined while fully unloaded since the evidence establishes that there was cargo on the vessel during the December, 1951 dry docking at Seattle, Washington. A completely unloaded vessel was one of Vallet's requisites for a thorough hull examination (Tr 226). Vallet also testified that for a detailed and thorough hull examination he would go inside the vessel and examine all the welds on the inside (Tr 228-229). Such an examination was never made subsequent to the Class I casualty of Voyage 5 and prior to the loss of the vessel, and it could not have been made with cargo spaces loaded.

The foregoing review of the evidence establishes that the lack of due diligence in hull inspections to detect

incipient cracks and defects was the personal negligence of the Marine Superintendent, Vallet. His position in this regard is exactly the same as the position of the marine superintendent in the case of *In Re New York Dock Company*, 61 F2d 777 (2nd Cir., 1932). In that case the marine superintendent failed to make a detailed inspection of the vessel involved and failed to require anyone else (as Vallet with respect to Brenneke) to make a detailed inspection. The corporate owner was held negligent due to the inadequate inspection, and since the inadequate inspection was the fault of the marine superintendent, the company was held in privity and limitation was denied.

If it be contended that Vallet delegated the hull inspection to Brenneke, it is first of all the contention of these appellants that his act of delegation and method of delegation constituted personal negligence since he failed to pass on to Brenneke his important special knowledge as to the significance and importance of the Class I casualty which had occurred on Voyage 5 and of the very thorough examination required thereby. The situation here is comparable to the situation in *The SILVER PALM*, supra, 94 F2d 776 (9th Cir., 1937) where this court held that the company could not limit liability where it delegated responsibility to the master without advising the master of special

circumstances which would have led him to act differently.

Secondly, it is the contention of these appellants that since Brenneke was the man in complete charge of maintenance and repair in Seattle in December, 1951, he occupied a position of sufficient authority so that his negligence in conducting a very limited examination of the hull must be attributed to the company and must be considered the privity and knowledge of his employer. The law establishing the privity of the company on the basis of personnel with authority similar to that of Brenneke has been discussed in prior portions of this brief.

In addition to the crack in the vessel between frames 93 and 94, the trial court found that the vessel was taking water in No. 1 hold. The evidence establishes that there was no deck cargo in the vicinity of No. 1 hold. Therefore, the entrance of water into No. 1 hold did not occur through a breaking of the hatch cover by deck cargo, as was the case at Nos. 2 and 3 hatches, and the water must have entered through some substantial break or leak in the ship's hull or deck in the vicinity of No. 1 hold.

This defect in the No. 1 hold has also been found by the trial court in Finding No. V to be one of the factors of unseaworthiness which caused

the sinking, and the same negligently limited hull inspection which failed to detect the unseaworthiness at frames 93 and 94 applies to the area of the No. 1 hold. Under these circumstances, the lack of due diligence was the negligence of Lester Vallet and Harve Brenneke and was within the knowledge and privity of the company as outlined above.

H. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Conditions Resulting in the Opening of Number 2 and 3 Hatches.

Deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches with the result that No. 2 hatch became open and full of water. This condition was one of the unseaworthy factors proximately causing the loss of the vessel. The trial court stated that the evidence was insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of the voyage in this and other particulars.

Prior to the commencement of Voyage 6, cargo consisting of glass carboys of corrosive acid was stowed alongside Nos. 2 and 3 hatches on the forward deck of the SS PENNSYLVANIA. Mr. John D. Gilmore, an experienced Marine Surveyor with a background of exten-

sive sea experience, testified that when the vessel sailed for Voyage 6 in January across the North Pacific with a cargo of corrosive acid stowed adjacent to the No. 2 hatch, the vessel was unseaworthy. This opinion was corroborated by the testimony of two experienced sea captains, Captain Harry Johnson (Tr 2433-2434) and Captain Ulstad (Tr 2220). Richard A. Johnson (an expert witness called by petitioner—who held a Master's license) admitted that it was more dangerous to have *any* deck cargo on such a crossing (Tr 1750-1751).

The serious hazard of carrying deck cargo in the heavy seas to be anticipated in the North Pacific in January was known to the States Steamship Company. The logs of the vessel introduced into evidence (Exs 40-44) establish that on each of the preceding voyages of the SS PENNSYLVANIA, some objects on the deck of the vessel had broken loose, and caused damage (Tr 159, 189, 190, 191). (In fact Vallet stated that heavy weather damage happens "practically on all voyages" (Tr 191) to ships operated by States Steamship Company).

Carriage of the deck cargo on the fatal voyage was particularly dangerous due to the fact that the vessel was carrying bulk grain in the lower holds. Bulk grain is considered a dangerous cargo (Ex 59) which necessitates the most particular attention to security of the

hatches. For the carriage of this grain cargo, the bilge strainers had been secured with burlap (Ex 186, pp 6-10 and 22-23). With the bilge strainers so secured there was no way of pumping out water if it once entered the cargo hold (Tr 1220, Ex 59, p 42).

For this reason the standard publication, Modern Ship Stowage, (Ex 172) specifies additional precautionary measures to be observed in securing the hatches of a vessel carrying bulk grain in the lower holds. These measures include the use of chafing gear to prevent the cross-battens from wearing or cutting the tarpaulins on the hatches, which is to be anticipated even where the cross-battens are in good condition.

The publication, Modern Ship Stowage, has received general recognition and was referred to in *The NORTE,* 69 F Supp 881 (D.C.E.D. Pa., 1947), as a guide to the proper method of stowing a vessel. Despite these published instructions for stowage of bulk grain cargo, no chafing gear was furnished the SS PENNSYLVANIA on its fatal Voyage 6, and this omission constitutes another instance of Vallet's personal neglect which jeopardized the vital security of the forward hatches of this vessel.

With knowledge or the means of knowledge of the danger of carrying deck cargo under the above circumstances, Mr. William Pitzer, the man in charge of

cargo operations for the States Steamship Company, preplanned the cargo for Voyage 6, and offered space, including the entire deck of the vessel to the U. S. Army. The negligent deck cargo stowage plan was, therefore, the personal negligence of Mr. Pitzer, and as the man in charge of the operating department, his negligence constituted the knowledge and privity of the corporate owner in accordance with the decisions already cited in this brief.

In addition to the negligence in making the deck of the vessel available for any cargo at all, further acts of negligence were committed when the Army corrosive acid cargo was stowed on the forward deck of the vessel rather than on the after deck of the vessel as previously preplanned by the Army. This change of the cargo to the forward deck was ordered by the Master of the vessel, but knowledge of the forward deck stowage was not confined to the Master of the vessel since a regularly employed supercargo was aboard the vessel for States Steamship Company and testified that he reported this stowage to the Seattle office of the Company on the day that it was so stowed. This supercargo operated under Mr. Pitzer's supervision and direction (Tr 237) and was in charge for States Steamship Company "to see that the cargo is loaded the way we want it loaded."

Mr. Paul Matson was the man *in complete charge* of the Seattle office of States Steamship Company. Since this unseaworthy stowage of cargo was reported to him, he had knowledge of the condition, and his knowledge is likewise the knowledge of the company due to his *position of authority* in the Port of Seattle. See *Wilbur et al v. Williams S. S. Co.*, supra.

The States Steamship Company has attempted to deny knowledge and privity in connection with this unseaworthy deck cargo situation by seeking to establish that the final authority with regard to this rested with the Master of the vessel. However, Mr. Vallet has refuted that contention in his own testimony. See Tr 284 where Mr. Vallet states:

> "When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect * * *"

It is well established that the improper stowage of articles which will imperil the safety of the ship if they come loose, renders a vessel unseaworthy. *The TITANIA*, 19 F 101 (D.C.S.D.N.Y., 1883); *The INDIEN*, 5 F Supp 349, affirmed 71 F2d 752 (9th Cir., 1934).

The rule with regard to the stowage of deck cargo is well stated by Judge Learned Hand in the *West Kebar*, 147 F2d 363 (2nd Cir., 1945), 1945 AMC 191.

In this case, Judge Hand, confronted with a situation almost identical to the deck cargo stowage in the present case stated, at p 365:

> "The consequence of any such break being so great the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and catastrophic storms, and such care the ship did not in fact bestow as the evidence proved."

The foregoing cases establish that the finding by the trial court of unseaworthiness in connection with the deck cargo which broke loose is well supported by the record. On the other hand, the finding of lack of privity or knowledge of the company in connection with this condition is clearly erroneous since Vallet admitted to his own control over cargo stowage (Tr 284), and the record establishes that the planning of the cargo for the deck of the vessel was the personal act of Mr. Pitzer, the man in charge of the cargo operations department for the company, and further the evidence establishes that the forward stowage of acid cargo was reported directly to Mr. Matson, *the man in charge* of the Seattle office.

A further important factor bearing upon the breaking open of the forward hatches was the defective condition of the cross battens, which constituted the secur-

ing devices designed to hold the tarpaulins on the forward hatches. Three seamen, who had served aboard the SS PENNSYLVANIA as members of the crew on Voyage 5, testified that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secured. See testimony of Alvin Huston, Ship's Carpenter (Tr 2081, 2082), Richard S. Brooks (Tr 2094) and Royce Cornwall (Tr 2100). Expert testimony established that a Victory ship sailing for a North Pacific voyage in January with cross battens that are in a bent condition so that they were difficult to secure and difficult to keep secure would be unseaworthy (Tr 2301, 2434).

In connection with these bent cross battens, the evidence establishes that a deck load of heavy timbers came loose and drifted around the forward deck of the vessel on Voyage 5 (Tr 2095, Ex 44). *The record fails to indicate that any inspection of the cross battens was made subsequent to that occurrence or that any replacement or repair of the cross battens was made subsequent to that occurrence.*

Vallet was aboard the vessel at Portland during Voyage 5 subsequent to the time when the timbers had come loose and drifted around the forward deck. There is no evidence that Vallet, or any assistant, ever in-

spected the cross battens on the forward hatches. When he dispatched Mr. Brenneke to inspect the vessel in Seattle, Washington at the conclusion of Voyage 5, Vallet admits that he gave Mr. Brenneke no special instructions, stating that Mr. Brenneke was fully qualified and knew what procedure to follow (Tr 270). There is, however, no evidence that Mr. Brenneke or any other personnel inspected the condition of the cross battens on the forward hatches at the conclusion of Voyage 5 or prior to the outset of Voyage 6, or that Mr. Vallet was not aware of this fact.

From authorities previously reviewed, it is clear that a ship owner cannot claim lack of knowledge or privity based upon the ignorance of supervisory personnel and arising from failure to inspect and observe conditions physically present to be seen. The defective condition of the cross battens would have been discovered by Vallet or Brenneke if they had undertaken *any* reasonable inspection of this equipment and such an inspection was a direct responsibility of Mr. Vallet and Mr. Brenneke. It is, accordingly, clear that both of them had the means of knowledge of the unseaworthy condition of the storm battens and that this condition was within the privity and knowledge of the corporate ship owner. It is likewise clear that States Steamship Company has completely failed to establish Mr. Vallet's

lack of knowledge or means of knowledge as to this defective condition.

It follows that the Company has completely failed to carry the decided burden of proof as to lack of privity with respect to the defective storm battens, particularly when Vallet knew that there was no chafing gear aboard.

CONCLUSION

We must again emphasize the well established principle that to be entitled to limitation, States Steamship Company must sustain its burden of proving a lack of knowledge or privity with respect to the unseaworthy conditions which the trial court has found existed on the SS PENNSYLVANIA at the inception of its fatal voyage, and which the trial court has held proximately caused her loss. These appellants, representing cargo interests aboard the vessel, are not required to prove a lack of knowledge or privity on the part of the shipowner.

It should be borne in mind that in finding liability on the part of the shipowner, the trial court has held that the vessel was unseaworthy in various particulars and that the shipowner failed to exercise due diligence to make the vessel seaworthy as to any of those particulars.

We have heretofore demonstrated that the failure of the shipowner to exercise due diligence in respect to each of the factors of unseaworthiness causing the vessel's loss was the personal default and negligence of the shipowner's Marine Superintendent and Port Engineer, Mr. Vallet, his Assistant Port Engineer Mr. Brenneke, and the other supervisory personnel, each of whom were executives of the shipowner vested with a high degree of responsibility in the company's management and operations. Without question (under the authorities we have reviewed) the privity and knowledge of these individuals and their lack of due diligence in respect to the vessel's unseaworthiness is to be imputed to States Steamship Company. Under these circumstances, to allow the Company to limit its liability for lack of privity or knowledge would place a premium on careless and indifferent corporate management.

It is the position of these appellants that the shipowner has completely failed to undertake or carry its burden of proving a lack of privity or knowledge or means of knowledge respecting the unseaworthy conditions found by the trial court to have caused the loss of the vessel and that for this reason alone the trial court erred in granting limitation of liability.

Nevertheless we are of the firm and sincere belief that the evidence most conclusively establishes the

existence of privity and knowledge on the part of the shipowner, imputed to it by reason of the knowledge, privity and negligence of executive personnel of the shipowner immediately charged with inspection, maintenance, repair and loading of the vessel.

Respectfully submitted,

Koerner, Young, McColloch & Dezendorf
John Gordon Gearin
George B. Campbell

Proctors for Appellants Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company.

Summers, Bucey & Howard
Charles B. Howard

Proctors for Appellant The Dominion of Canada.

APPENDIX A

DISPATCHES

TIME OF RECEIPT SHIP	PCST	GMT	TEXT
0543	0643	1443	1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL DECK HALFWAY DOWN ENGINE ROOM PORT SIDE WIND WNW 9 VERY HIGH WESTERLY SEA VESSELS IN VICINITY PSE QRK AND QSL DE KWTC AR
0611	0711	1511	1400 GMT POSN 51.09 N 141.31 W CRACK DOWN SIDE OF VESSEL IN ENGINE ROOM BETWEEN FRAMES 93 AND 94 IN WELD STARTING IN SHEER STRAKE AND RUNNING DOWN ABOUT 14 FEET WILL TURN AROUND AS SOON AS POSSIBLE AND PROCEED SEATTLE
0629	0729	1529	1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST HULL CRACKED 14 FEET DOWN PORT SIDE INTO ENGINE ROOM VESSEL TAKING WATER BUT CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE VESSELS IN VICINITY PSE KEEP CLOSE WATCH BT DE KWCT

0907	1007	1807	091730ZGMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM
0935	1035	1835	USE TURNBUCKLES TO HOLD CRACK IN COMPRESSION STARTING FROM DECK HEAD ADVISABLE TO DRILL END OF CRACK WITH AIR DRILL STOP WHAT ARE WEATHER CONDITIONS KEEP US INFORMED
1030	1130	1930	1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CAN NOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE VERY HIGH SEAS CAN NOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CAN NOT GET ON DECK TO SECURE MASTER
1020	1120	1930	FOLLOWING RECD ON 500KCS QUOTE SOS SOS SOS DE KWCT KWCT KWCT BT SS PENNSYLVANIA AT 1920 LAT 51.09 N 141.13

			W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD DOWN BY HEAD REQUIRE AID AR DE KWCT HW UNQUOTE
1052	1152	1952-6	POSN 49.10 N 142.35 W HAVE HIGH SEAS DID YOU GET ASSISTANCE YET AND WHAT YOU NEED
1107 1112	1207 1212	2007-9 2012	DO YOU WANT US TO RETURN AND STAND BY YOU? NO, YOU MAY PROCEED OTHER SHIPS CLOSER AND THANKS
1115	1215	2015	SOS PENNSYLVANIA 1920 GMT PSN 51.09 N 141.13 W . . TAKING WATER IN ENGINE ROOM AND NR 1 HOLD TARPS FWD HATCHES STILL HOLDING USING HAND STEERING . . NEED ASSISTANCE . . AR
1315	1415	2224	PENNSYLVANIA DISABLED AND FLOODED POSN 142.40 W 49.40 N IMMEDIATE ASSISTANCE (From QUEENS VICTORY Radio Log, Ex 128)
1345	1445	2245	DISABLED AND FLOODED ENGINE ROOM AND NO. ONE HOLD POSN 49.40 N 142.40 W . . QRM LAST PART (From QUEENS VICTORY Radio Log, Ex 128)

1504	1604	0004	GOT STEERING GEAR FIXED BUT CANT STEER AS RUDDER TOO FAR OUT OF WATER NR 2 HATCH OPEN AND FULL OF WATER LOOKS LIKE ONLY HOPE IS FOR WEATHER TO MODERATE
1522	1622	0022	LOOKS LIKE WE HAVE TO ABANDON SHIP
1527	1627	0027	45 PERSONS ABOARD AND FOUR BOATS
1530	1630	0030	LEAVING NOW

No. 15131

United States
COURT OF APPEALS
for the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

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THE DOMINION OF CANADA, *Appellant,*

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STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees.*

BRIEF OF STATES STEAMSHIP COMPANY AS APPELLEE IN ANSWER TO THE BRIEFS OF UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA AS APPELLANTS ON THE QUESTION OF LIMITATION

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
LOFTON L. TATUM,
1310 Yeon Building,
Portland, Oregon;
BOGLE, BOGLE & GATES,
STANLEY B. LONG,
C. CALVERT KNUDSEN,
Central Building,
Seattle, Washington,
Proctors for Petitioner-Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-57

SUBJECT INDEX

TABLE OF CASES

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Appeal from the United States District Court for the District of Oregon.

To the Honorable Judges of the above entitled Court:

Before proceeding to a more detailed statement of the case and argument, we would like to make these preliminary observations:

I.

This is appellee's brief in answer to two briefs of the Government and the insurance companies. Where both those briefs cover the same subject, we shall answer then, insofar as possible, as one. Where they materially differ, we shall answer each separately.

II.

If the contentions in our opening brief as appellant are upheld, as we believe they must be, then of course this brief and all discussion of limitation become superfluous.

III.

Limitation is favored, as this Court so well knows. Even as recently as 1943 this doctrine has been enunciated again by the United States Supreme Court, declaring that the statute must be construed liberally in the interest of shipowners, and not administered with a tight and grudging hand. Coryell v. Phillips (1943), 317 U.S. 406, 411. There are many other authorities, and this Court knows them well.

IV.

To defeat limitation the claimants must prove not merely that there was a failure in equipment and inspection or personnel to which the shipowner was privy, but it must also be shown that such fault actually contributed to the loss.

"This is a practical world and an omission to which a ship owner is privy but which has not any causal connection with the damage for which claim is made is venial in the eyes of the law." The El Sol, 45 F. (2d) 852 (D.C.S.D.N.Y. 1930).

V.

When the cases speak of knowledge, they sometimes include the means of knowledge, but only such means of knowledge as the shipowner is *bound* to avail himself of.

The Francesca, 19 F. Supp. 829,
The Cleveco, 59 F. Supp. 71, affirmed 154 F. (2d) 605,

both cited in the insurance brief. It does not mean mere negligence.

La Bourgogne, 210 U.S. 95,
American Hawaiian SS Co. v. Pacific SS Co., 41 F. (2d) 718.

VI.

The presumption is in favor of the Trial Court's Finding of Fact. His Finding of lack of *privity* is a Finding of *Fact* not to be disturbed unless clearly contrary to all the evidence.

VII.

Counsel say that the burden of proving lack of privity is on the petitioner. That is true in the first instance. But the petitioner has borne that burden. The burden has now shifted, or at least the burden of persuasion. For the appellants must now persuade this Court that the Trial Court's Finding on this question of fact was clearly erroneous.

VIII.

Mr. Vallet, acting Marine Superintendent, is the principal target of appellants in their endeavor to establish privity. As the Record shows, and as will be demonstrated in our argument, his alleged privity could, at the most, relate only to the alleged "crack-sensitiveness" or "notch-sensitivity" of the vessel's hull, and in a minor way to the emergency steering gear rod from the poop deck to the engineroom below.

He was not privy to the steering gear in general. That was the province of the ship's officers, supplemented by the American Bureau surveyors and the Coast Guard inspectors.

Nor was he privy to cargo stowage. It was not in his department and he knew nothing about it. In this case it was the business of the Army and the ship's master.

It is plain too that he was not privy to the cross-battens on the hatches. He relied on his ship's officers and got no adverse reports. There was nothing wrong with them anyway.

Minor characters at whom appellants aim are Brenneke, one of Vallet's assistants, Pitzer, of the Company's Cargo Department, and Matson, District Manager of the Seattle Branch Office. Their inconsequentialities will be demonstrated.

Such is the brief outline of our case.

IX.

The sole question presented by claimants' appeal is as follows:—

Where the Trial Court has stated in his Memorandum Opinion that "Those charged with (the vessel's) inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without privity or knowledge of the owner of the vessel", and where he has followed this with Finding (VII), "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner", and where these Findings of Fact are amply supported by overwhelming evidence of the personal diligence exercised by the managing agents of the corporate shipowner, is there any basis upon which those Findings can be set aside as clearly erroneous?

X.

We are unable to accept in their entirety the statements of the case in appellants' two briefs. Certain inaccuracies or incomplete statements occur in each. Some of these we can cure in the argument. A few we notice now.

For example, in the insurance brief, the definition of a Class I Casualty as danger to the vessel, etc. (page 5), means, of course, *before its repair.*

The statement on page 11 of the insurance brief that no other ship sustained major heavy weather damage we disagree with, as pointed out in our Opening Brief, page 59.

The "significant radio messages", referred to on page 12 of the insurance brief and set forth in the appendix, omit the first, and very significant one,—

"WIND 292° VEL. 45-50 M.P.H. SEA HT MOUNTAINOUS" (Exh. 97).

The statement in the Government brief, page 18, that the Maritime Commission "warned" against the alteration of the deep tanks, quoting a letter from the Commission, is only a half truth. The brief omits to add that the writer of the letter *was overruled by his superiors in Washington and the objection was withdrawn* (Tr. 154-155, Exh. 7; Tr. 249-253).

On page 27 of the Government brief is a statement of weather forecasts, purported to be supported by Exhibit 176. The exhibit was never introduced, and is not in evidence, and is no part of the record.

At pages 27 and 28 of the Government brief, reference is made to the radiograms from the ship, but again omits Exhibit 97 with its highly significant "SEA HT MOUNTAINOUS".

With these corrections, we now proceed to our own.

STATEMENT OF THE CASE

We made a brief statement of the case on pages 67 to 72 of our Opening Brief as appellant, under the heading "Evidence of the PENNSYLVANIA's Seaworthiness". It is appropriate now, however, since we are discussing a new subject, namely, limitation and privity, to make a further statement pertinent to that subject. This statement will show the general organization and setup under which the shipowner operated its ships, including the PENNSYLVANIA.

Mr. J. R. Dant was the Vice-President and General Manager in charge of the Company's general activities (Tr. 2618). Neither he nor any of the directors took any direct part in the operation of the vessels. The Marine Superintendent, Captain Dyer, was on leave of absence during all the period in question, and his duties were performed by Mr. Vallet, Port Engineer and acting Marine Superintendent, who was in direct charge of the upkeep, repair, maintenance, manning and supplying the ships (Tr. 140, 2618-9). He had nothing to do with the cargo part of the operation; neither its booking, loading, stowing or anything else (Tr. 187, 280-281, 486, 1174, 2619, 2687, Exh. 132B, Article 5(h)). In a general commercial operation, cargo was booked or contracted for, by the Cargo Department of the Company, loaded by stevedores employed by the Company, and stowed under the supervision of the master of the ship.

In this present case of the PENNSYLVANIA, the procedure was different. Certain space of the ship, including the deck, was simply made available to the Army under contract (Exh. 132-B), for such cargo as they wished to be carried, and the Army loaded it with its own stevedores and its own supercargoes, but under the final supervision and control of the ship's master. The petitioner also had supercargoes aboard. They were not regular employees, but were hired out of the Union Hall for this job. They had nothing to do with stowage of cargo, as affecting seaworthiness. Rather, their function was mainly to report daily on the progress of the loading (Tr. 1166), and to see "that the Army stays

within the space they are paying for" (Tr. 2575), and makes a tight stow, "using no more space than would normally be required for the loading of like cargo (Exh. 132-B, Art 5(b)).

Mr. Vallet had set up, or more properly, had succeeded to, a system for the upkeep and operation of the vessels, whereby the officers of the ship, and particularly the master and chief engineer, were held directly responsible for the proper upkeep, maintenance, and repair of their own ship. These are trained men, of long experience, who have to pass rigid Coast Guard examinations before attaining their office, and the system of relying upon them is that employed in all well-run steamship operations by all companies. (Cf. Mr. Brenneke's testimony about the examination and qualifications of a chief engineer, Tr. 321-322.)

Pursuant to this system Mr. Vallet, or one of his assistants, would visit each vessel on its return from a voyage, get the reports from the officers of the vessel's performance and any voyage repairs needed, and see that the officers' requisitions therefor were fulfilled. The system was a good one, universally recognized in shipping operations, and Mr. Vallet was diligent in employing a competent shore-side staff to see that it was carried out. His own wide experience and qualifications may be read on page 139 of the Transcript. He, himself, describes the functions of his department in these words:—

> " . . . I was in charge of the Marine Department which in addition to the maintenance and repair of

the vessel also is charged with the obtaining of personnel and the officers for the ships and maintaining the discipline on the vessels and also supplying and storing the ships." (Tr. 140).

His own description of the working of this system may be found in the following excerpts from his testimony:—

"Whenever a ship returns from a voyage, either myself or one of my assistants boards the vessel on arrival and discusses the general condition of the vessel with the Master, chief engineer, and we obtain a list of repairs which are requested by the vessel.

Q. Voyage repairs, you mean?

A. Voyage repairs, and examine any other damages that have occurred on the voyage." (Tr. 160-161).

"Q. What are the functions of a chief engineer with regard to the upkeep of the vessel and reporting to his superiors at the end of a voyage what has to be done?

A. It is the responsibility of the chief engineer to prepare requests for voyage repairs before the vessel arrives in port. He obtains a request for repairs from the other departments, and in conjunction with the Master determines what repairs will be necessary before the vessel again goes out on the next voyage.

Q. So the chief engineer is the officer primarily responsible for those things, is he?

A. Yes, he is." (Tr. 172-173).

Referring to a spare propeller which was carried on the poop deck and lost overboard in a storm:—

"We looked to the Master and the officers to report any condition which in their opinion is not satisfactory.

Q. Assuming the fact that you were Marine Superintendent, assuming it was in Portland, she was loaded here, you would have gone down there and taken a look yourself to see if they were adequately secured?

A. Well, we make inspection of vessels for our own satisfaction; however, we hold the Master and his officers responsible for that." (Tr. 187-188).

"When a vessel comes back from a voyage you or your assistant inspect the vessel upon its return, talk to the Master, talk to the Chief Engineer?

A. Yes, sir." (Tr. 188-9).

"We check the vessel and we always depend on an examination by the officers, reports that we obtain from the officers." (Tr. 231).

To the same effect is Mr. Brenneke's statement:

"The Chief Engineer takes that oath when he receives his original Chief Engineer's license, that he will maintain and operate the ship and keep in repair all machinery and appurtenances on the vessel to the very best of his knowledge and ability, and he swears to that statement." (Tr. 321).

Of course the steering gear and cross-battens on the hatches, both of which have been subject to attack by claimants, fall within the appurtenances and equipment of the ship, which it is the responsibility of the officers, and not Mr. Vallet personally, to keep up.

To be specific on this point, Mr. Matthews, Chief Engineer of the PENNSYLVANIA on all five voyages prior to the last, testified as follows:—

"Q. As Chief Engineer you are responsible for the proper functioning of the steering apparatus of the ship, are you not?

A. That is right.

Q. And as such on Voyage 5, did you make inspections of the steering gear from time to time?

A. Yes, and inspections are also made every watch.

Q. By whom?

A. By the man oiling the steering engine.

Q. By the what?

A. By the man oiling the steering gear.

Q. In your inspections would you have occasions to go aft of the steering engine room?

A. I would go aft every day. I would inspect everything every day, all of the equipment that is running." (Tr. 350-351).

Similarly as to the cross-battens, if there was anything wrong with them, which there wasn't, it would not be up to Mr. Vallet, it would be up to his ship's officers to repair them, or if new ones were needed, to requisition them.

Matthews testified:—

"Q. There has been some testimony here that the cross-battens on the hatches, or possibly the other battens but I am not sure, were bent or twisted. Whose function on the ship is it to repair the battens if they are defective in any way?

A. The engine department.

Q. Is that your department?

A. Yes, sir.

Q. Did you ever receive from the deck department any request to make any such repairs?

A. No, sir.

Q. Did you ever repair any deck battens?

A. No, sir; not on that ship. No, sir." (Tr. 2830).

Mr. Vallet, as acting Marine Superintendent, was diligent in the extreme in enforcing this system. Either he personally, or one of his assistants, visited each ship

on its return, obtained the reports of the ship's officers and acted on them, one of his assistants remaining in attendance on the ship to see that everything necessary to be done, was done. He personally attended the annual survey of the ship by the Coast Guard and the American Bureau at Tacoma and Seattle in August, 1951. He sent Mr. Brenneke to attend the drydock examination in December, 1951 (Tr. 177, 270-271). He personally, in conjunction with the American Bureau and the Coast Guard, drew the specifications for the repair of the deck crack on Voyage 5, and personally attended to the repairs and saw that they were carried out. Through his own personal diligence at that time, he discovered the little minute crack where a deck padeye had been flushed off on the port side of the deck, and had it cut out and an insert plate put in. He, along with the Coast Guard, attended to the minor matter of freeing the emergency steering gear rod from the clothing wrapped around it. After the repairs to the deck crack, "The vessel was in topnotch condition in every way possible," and between that date and the time for departure from Seattle, January 5, he never received any reports or statements or any information derogatory to her seaworthiness (Tr. 177). In fact, since the vessel performed perfectly on all her five voyages (Tr. 188, 338-339), it is plain that he never received any adverse reports at any time.

Neither Mr. Vallet nor his department had anything to do with the stowage of cargo. That was, as in all proper steamship operations, the final province and pre-

rogative of the ship's master, aided by his mates. This is stated so many times in the record (Tr. 187, 280-281, 486, 2619, 1174, Exh. 132-B, Tr. 2687) that it is curious claimants should even question it.

The very contract under which the cargo was carried provided that it was to be loaded under the supervision and final direction of the master. Vallet had no reason to know where the cargo was stowed or how it was stowed. It was not his business.

The Company maintains branch offices at various ports,—Los Angeles, San Francisco, Seattle and elsewhere. The Seattle office was in charge of the district manager. It was a booking office to solicit and book cargo and to some extent to husband the ships,—nothing more. Mr. Dant testified regarding the nature of that branch office:

> "Well, it is a traffic office used principally for soliciting and booking of cargo.
>
> Q. Does it have any power to make decisions about the operations of ships?
>
> A. No." (Tr. 2916).

The local head of this office was a Mr. Matson and he had an assistant named Mr. Graham,—with no authority except to husband the ships "to some extent" (Tr. 220).

Since an attempt has been made to established privity, regarding the deck stowage of cargo, on Mr. Pitzer, we mention him. He was in the Portland office and although referred to as head of the "Operating Department" really had no function except to preplan the load-

ing of cargo in a commercial operation, but always subject to the approval of the master and merely as a suggested guide to the master (Tr. 294-295, 2775).

That is in a commercial operation. In the case of the PENNSYLVANIA where, except for the barley, the whole vessel was to be loaded by the Army, Pitzer had nothing whatever to do with it.

> "Q. In the case of the PENNSYLVANIA on Voyage 6, aside from perhaps informing the Army that there was certain space available on the ship for their cargo, would you have anything to do with laying it out, or loading it, or stowing it, or lashing it?
>
> A. Not on the PENNSYLVANIA." (Tr. 2775).

As in all proper ship operations, the time of the ship's departure, the route she should take and her navigation were all the function and duty of the master and to be decided by him in his own sole discretion (Tr. 284, 285, 507, 2619).

As Mr. Vallet testified:

> "No, we do not try to operate the vessels from our office." (Tr. 285).

Both of counsels' briefs quote a single statement of Mr. Vallet's, apparently to imply the contrary of this. This is the statement:

> "When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect, and leave it up to him when he should leave." (Tr. 284).

Quoted in the Insurance brief, at page 54, and in the Government's brief twice, once at page 52 and again on page 59, counsel say that this shows that the stowage of

the deck cargo was under the direct supervision of Mr. Vallet (contrary to the oft-repeated testimony that it was under the supervision of the master). The statement has been lifted out of context and misinterpreted. A reference to the record will show that when Vallet made the statement, the loading and stowing of the cargo were not the subject under discussion at all. Nobody was talking about it. They were only talking about the master's full authority to navigate his ship and decide when to leave port (Tr. 284-5). The statement merely means that when the cargo which has been booked for the ship is on board, and she is stored and bunkered as ordered by the ship's personnel, the master is so notified. (Not by Mr. Vallet. By "we"—whomever is husbanding the ship.) And then the master decides "when he should leave" (Tr. 284).

Furthermore, the reporter's transcription of the statement contains an error (of which there are a number throughout the whole transcript). The word "stowed" should be "stored". You do not *stow* and bunker a ship. You *store* and bunker her. The two words go together, and are complementary. To make a ship ready for her voyage, you "store" her with provisions and supplies, and "bunker" her with the necessary fuel. Then she is ready, and as Vallet said, from then on it is up to the master to decide when he should leave (Tr. 284). This corresponds with Mr. Vallet's previous testimony that one of the jobs of his department was "supplying and *storing* the ships" (Tr. 140).

So much for the general organization of the Com-

pany and its system of operating ships. Further facts in regard to the deck crack, alleged "notch sensitivity", steering gear, etc., can be reserved for our argument.

ARGUMENT

THE ALLEGED "NOTCH SENSITIVITY," OR "CRACK SENSITIVENESS" OF THE VESSEL AND VALLET'S ALLEGED PRIVITY WITH IT

Both the Government's brief and the Insurance brief allege this, and therefore we shall treat them together. The substance of the charge is that the 22-foot deck crack on Voyage 5 gave notice to Vallet that the vessel was notch-sensitive, and that he did not make adequate examination of the vessel afterwards in face of that warning. And that if he had, he would have discovered a notch sensitivity, where the 14-foot crack subsequently developed, and could have done something about it. This argument necessarily centers around that crack. The Government brief even quotes the finding of the Trial Court that the crack sensitiveness was "by reason of", i.e., caused by the 22-foot deck crack, which as we have shown in our opening brief, is without any testimony whatever.

To consider this question we have to determine whether the vessel was notch-sensitive at all. We do not think the proof sustains that. The 22-foot deck crack was explained by Vallet to be the result of a combination of three unfortunate factors, — (1) very heavy weather, (2) a heavy deck load of Jap squares, concentrating stress at that point, and (3) the incipient crack

where the padeye had been, which started the fracture. Mr. Williams showed that this steel met all the standard requirements.

The only other evidence would be the 14-foot crack in the port side, but since that occurred in the greatest storm in thirty years and not in any *steel* of the vessel, but in a *butt weld,* that can hardly be accepted as proof that the vessel was notch-sensitive. Especially in the face of the testimony of Mr. Williams above referred to (Tr. 1859, 1869, 1875, 1877-1878).

We discount the testimony of Mr. Hechtman since, as shown in our opening brief, it was based on an entirely false hypothesis of a hog, and since the little tiny deck cracks at the padeyes, which he took as evidence of strain aging, due to the hog, are not at all unusual and are found in nearly all vessels (Tr. 2745, 2885-2886). And had nothing to do with the 14-foot crack.

Now to consider Vallet's alleged privity, let us see what he did. When the vessel arrived in Portland with the 22-foot deck crack, Voyage 5, after conferring with the American Bureau and the Coast Guard, he prepared specifications for the repairs in accordance with their and his own experience, which specifications were agreed on by all, and those repairs were fully carried out by the Albina Yard, a reputable ship-repair yard of fifty years' experience.

In those specifications he included a requirement that samples of the steel be sent by the repair yard to the Coast Guard and the American Bureau (Exh. 10). This was in accord with a requirement of the Coast

Guard, applicable to all shipowners, to enable the Government to study the problem of fracture. It is, however, further evidence of his care to do everything required. These are the samples Mr. Williams tested.

The repairs consisted of inserting new plates where the crack was wider and veeing out and welding it where it tapered to a hair-line. When the repairs were finished they were hose-tested, examined from both above and below decks, and found to be complete. All—the American Bureau, the Coast Guard, Vallet, the repair-yard, the U. S. Salvage Association, and Lloyds—agreed on this and later Mr. David P. Brown, Vice-President and Technical Manager of the American Bureau, and a member of the Ship Structure Committee, and Captain Nordstrom, testified that the manner of carrying out these repairs was in every way proper. Nobody questioned the method except a Mr. Godfrey, in a minor matter. Vallet testified that the ship was better than before because the incipient padeye crack had been removed (Tr. 215). The Trial Court has found that this 22-foot crack was "fully repaired". The "girth area" of the ship, which Mr. Brown and others testified included all area where the effects of the crack might have been felt, was examined, and as Vallet said on "close inspection" (Tr. 165), a tiny suspicion of a crack was discovered where a padeye had been on the port side, symetrically opposite where the deck-crack had occurred. This was removed and an insert plate put in. The whole deck, even the plates underneath the housing, and this whole area of the ship, were "thoroughly exam-

ined", and hose-tested, and no defects found (Tr. 266-269).

Nobody suggested then, and no witness at the trial suggested since, that an examination of the whole ship should be made, not even Mr. Hechtman. It is only counsel who now suggest it.

The vessel then sailed across the Pacific and back. No trouble was experienced of any kind, either where this crack had been or anywhere else.

Mr. Matthews, as Chief Engineer, his first assistant and the mate, pursuant to the Company's regular practice of holding ship-officers responsible, examined the empty holds of the vessel and accessible places on the return Voyage No. 5, examining for cracks, or excessive rust, or hatch boards broken, or "anything", found nothing and made an official report to the office to that effect (Tr. 379-380).

Mr. Matthews also testified that the place on the port side where the crack occurred between Frames 93 and 94 was right at, and formed the side of, his machine shop and storeroom in the engineroom, and that his work put him "right up against it sometimes", and he never saw any defects (Tr. 349-350).

The vessel was drydocked at Todd's in Seattle and a drydock examination made by the American Bureau, the Coast Guard and Mr. Brenneke, Mr. Vallet's assistant. All was found in order.

The foregoing is a narrative of the facts. We now take up the various contentions regarding "crack sensi-

tiveness' or notch sensitivity (Govt. Br. 35-41; Ins. Br. 39-50).

First, the Government's brief contends, on page 36, that no inspectioon of the padeyes on the deck was made after February, 1951, and prior to Voyage 5, and that such inspection would have disclosed the incipient fracture that later spread into the 22-foot crack on Voyage 5. It is hard to see what that has to do with the case. It was certainly disclosed when the 22-foot crack occurred. That crack did no harm, was fully repaired, and is now behind us. In fact, according to opponents, it must have been a *good* thing, because it served as "warning".

The Government next contends that the "ESSO MANHATTAN" should have served as a warning. It is a little difficult for us to understand the Government's brief on this point, but apparently that is their contention. It is hard to see why. The "ESSO MANHATTAN" was a tanker. Tankers by their construction are much more susceptible to cracking than Victories. The cracking of one tanker out of a fleet of many hundreds is not a warning to anybody of anything. Certainly not to a Victory. Counsel have stressed the point, which they say is a fact, that this deck crack in the PENNSYLVANIA was the first crack of a Victory in two thousand ship-years. This good record of the Victories, rather than the isolated tanker "ESSO MANHATTAN", was the fact confronting Mr. Vallet. The Victories are good.

The "ESSO MANHATTAN", however, does bring up a subject well worth noting. As disclosed in that case, fractures are of two kinds. One is a "shear" fracture

where the metal simply parts because, good as it is, it cannot stand the stress put on it. The other kind is a notch-sensitive fracture, which occurs because the steel is notch-sensitive. The two kinds of fracture are identified by marked characteristics. In the case of a "shear" there is a clean break. In the case of a notch-sensitive fracture, diagonal "chevrons" are left on the metal, which identify it as such. These chevrons were clearly discernible in the "ESSO MANHATTAN", and consequently it was decided that the fracture was from notch-sensitivity (121 F. Supp. at pages 774-775). In the case of the PENNSYLVANIA, however, since the ship was a total loss, no evidence remains as to *what kind of a fracture it was.* The steel being gone and the chevrons lacking, there is no proof at all that it was notch-sensitive. It may just as well have been a shear fracture caused by an overstrain of the metal in the midship section of the ship where the "bending moment" is greatest, as the ship alternately is buoyed in its center on a wave, or depressed in its center when its weight is sustained by waves fore and aft.

This is an important point since the burden of proving this unseaworthiness and notch-sensitivity was always on claimants.

Incidentally the notch-sensitivity, resulting in the crack in the Esso Manhattan, was held by the court to be a latent defect, for which the shipowner would not have been liable under the Carriage of Goods by Sea Act, 1936.

It is next contended by the Government that after

the 22-foot crack "immediate and exhaustive tests of the steel of the PENNSYLVANIA" should have been made. But what would such tests have shown? They would have shown that the steel, as Mr. Williams, the Government expert, himself admitted after making his own tests, fully met the accepted standards and requirements. Furthermore what "immediate exhaustive tests' could have been made? All the witnesses, even Mr. Hechtman and Mr. Williams, agreed with Mr. Brown, (1) that the test of one steel plate is no test of the plate next to it, or of any other plates in the ship, and (2) that there is no "non-destructive" test known, to determine notch-sensitivity. The only test is to cut a plate in pieces and take it to a laboratory for a laboratory test. What would claimants have had Vallet do here? Chop the ship into pieces?

The problem of "brittle fracture" has been, and still is the subject of intensive research by the American Bureau and the Government agencies. It is still unsolved. A great deal of money, and all the resources of the Government have been spent on it (Tr. 2810). Is Mr. Vallet supposed to be superior in his knowledge to all of these? And to be held accountable accordingly?

The Government's brief, on page 39, mentions Exhibit 185, and the Insurance brief, on page 41, mentions this and also Exhibit 189. These are reports of the Ship Structure Committee, and the suggestion is that they should have put Vallet on notice about notch-sensitivity. Exhibit 189, however, was not published until November, 1953 (Tr. 2812), nearly two years after the wreck.

Exhibit 185 concerned primarily Liberty ships, rather than Victories (Tr. 2766-67). It said this:

> "A tendency for certain ships to incur repeated casualties can be measured, but the trend is not great, and the effect is not significant." (Tr. 315).

It is hard to see how any such statement as that could put Vallet on notice of *anything*. In the first place, the PENNSYLVANIA was not a Liberty. In the second place, she had not suffered "repeated casualties". The 22-foot crack was the first. In the third place, the Report says that the effect of even *repeated* casualties "is not significant". Mr. David P. Brown agreed (Tr. 2742). Of all the witnesses who testified, he is the most informed, and the highest in repute. He said that certain ships do show a tendency toward repeated fractures, but the trend is *very insignificant,* and might be accounted for by other factors which would cloud the issue (Tr. 2742). Again: Referring to a vessel that has cracked, he said: "In so far as the vessel is concerned, we have never been able to establish any significance." (Tr. 2743). And that in his opinion the PENNSYLVANIA was seaworthy (Tr. 2809).

Both briefs mention the fact of incipient cracks where padeyes had been removed from the deck of the PENNSYLVANIA. What of it? (1) They had all been repaired. (2) They are quite common on vessels, do not affect their seaworthiness (Tr. 2745, 2885-86), and (3) they have nothing to do with this case anyway. For the only crack that occurred during the storm was in the vessel's *side,* not on the *deck,* and was in fact separated from the deck by a crack-arresting gunwale bar, and

was not in a plate at all, but in a *butt weld*. The suggestion that certain padeyes on the forward deck, to which cargo lashings where fastened, may have developed cracks during the storm is pure speculation. There is no evidence of it whatever. Besides cracks usually occur, if at all, amidships (Tr. 2603, 2777).

The Insurance brief suggests (pp. 41-48) that the examination of the vessel made immediately after the repair of the 22-foot deck crack was inadequate and incomplete and makes the same contention in regard to the drydock inspection later at Seattle, and both briefs contend that the inspection on the drydock was incomplete because information as to the prior 22-foot deck crack was withheld from the inspectors.

First, as to the examination made at Portland immediately after the repairs:

The Insurance brief quotes certain incomplete excerpts of Mr. Vallet's testimony, out of context, and from it argued that he, himself, set up a standard by which, after the deck crack, the vessel should have been put on drydock, completely unloaded and thoroughly examined, taking four or five days. These excerpts show how necessary it is for the Court to read not only what is quoted, but what is left out.

Here are the quoted excerpts:

> "Q. When it comes to making an inspection of a hull, and I am talking about a detailed inspection, you would require, first of all, I understand, Mr. Vallet, that the vessel be *completely unloaded?* (Emphasis supplied.)
>
> A. That is right.

Q. And it should be on dry dock?
A. For a complete inspection, yes.
Q. For a complete inspection?
A. Yes." (Ins. Brief 41).

Counsel have omitted Mr. Vallet's answer to the next question, the answer being that Mr. Vallet had in mind not only the inspection of the hull, but "Complete inspection including all *machinery and equipment, yes.*" (Tr. 227).

Counsel next quote this:—

> "Q. How long would it take you to make a detailed and thorough hull inspection of the vessel?
> A. It would take about four or five days." (Ins. Brief 42).

The immediate context, however, shows that he was talking about hull and all machinery and equipment (Tr. 227).

The foregoing testimony all related to a thorough and detailed examination of a ship, hull, machinery and equipment, by one contemplating its purchase (Tr. 224-227). Counsel then jump to an examination of a vessel after a crack. Here was the testimony:

> "Q. When there was a serious crack, then that meant to you, did it not, that a thorough examination must be made of that vessel?
> A. Yes." (Tr. 272; Br. 41).

It is obvious that here Vallet is talking about an entirely different thing, viz., an examination, not of the whole vessel, but only that part which might have been affected by the crack, viz., the "girth area", which is the only examination, as all the experts agree, that is necessary (Tr. 306, 2780-82, 2802-4, 2899-2900).

There is thus no foundation for the claim that the examination, after the 22-foot crack, should have taken four or five days on a drydock, and was inadequate.

It is next contended by the Insurance brief, page 43, that Vallet failed to direct a thorough examination of the vessel on the drydock in Seattle, and failed to attend that vessel in Seattle personally, and gave Brenneke, his assistant, no instructions for a thorough examination. It is hard to know just what is meant by this. The examination, together with the prior annual inspection in August, (the two, annual and drydock, examinations together make up the complete examination of a vessel), consumed the four days previously stated by Vallet as about the time required to make an examination. The drydock examination, by itself, took one day, which accords with Vallet's testimony that that is the time required (Tr. 229).

His personal absence from the drydock examination was not a "failure". There was no reason for him to be there. Mr. Brenneke, a thoroughly competent man, was there in person, and himself, along with the Coast Guard and American Bureau inspectors, made the inspections. Mr. Brenneke certainly needed no specific instructions. He knew all about the ship, including the 22-foot crack, and he knew what an inspection should be (Tr. 270-271).

> "The petitioner cannot be deprived of the right to limit liability because Mr. Berg did not give detailed instructions of the manner in which the work of installing the gas bag was to be performed to a marine engineer, one supposed to be skilled in such work, and so competent that he was the yard en-

gineer in the repair department." The Columbia, 25 F. (2d) 518 (C.A. 2, 1928).

It is next contended by both briefs (Ins. Br. 43-44 and less so by Govt. Br. 39) that the drydock inspection was inadequate because the Coast Guard inspector, Hamilton, and the American Bureau inspector, Wilson, were not informed of the 22-foot deck crack prior to their inspection, and apparently argue it as a personal faul of Mr. Vallet. In the first place, it should be observed that any instructions or information to these men would not come from Mr. Vallet, but from their own superiors in their own organizations. In fact, Wilson's answers show that he would rather resent instructions from any outsider (Tr. 769). In the second place it should be observed that it would not make any difference whether they knew about the crack or not. Their duty is to make a thorough inspection regardless, and not take any instructions or suggestions from anybody.

In the third place, the crack had been fully repaired, the ship was "in the same condition as before" (Tr. 897), and the prior crack was of no consequence.

In the fourth place, they probably knew of the crack because it was in their own Coast Guard and American Bureau records, and in the log of the ship, which they were inspecting, and they were accompanied by Mr. Brenneke who knew all about it.

But these are preliminaries. The more important thing is that there is no testimony whatsoever to support a claim that they did not have such information.

Counsel did not ask these men fairly and openly whether they knew of the 22-foot crack or not. Their attention was never focused on that at all. Instead, by a series of covert questions designed to hide their true intent, these men were asked whether they had any "special information" or "special instructions" in regard to examining the PENNSYLVANIA, and whether they had had any reports of anything "unusual" about her (Tr. 684-685, 768-769). That is all. (Commander Brown, the hull inspector, was not asked anything one way or the other.) These men said they did not have any "special information" and knew nothing "unusual" about the ship. Well, of course not. The crack having been repaired, the ship as good as she was before or better, there was nothing "unusual" to report. Mr. Wilson, the A. B. Surveyor, testified that he consulted his Bureau files on the ship before he went down to inspect her, and there was nothing "outstanding" against her (Tr. 769). As this Court knows, an "outstanding" item on a ship is something needing attention or repair to keep her "in class". On this flimsy basis, counsel have argued, not merely that these men did not have this information, but that it was "withheld" (Ins. Br. 44).

A final suggestion is made in the Insurance Brief that the inspection was incomplete because there was some cargo remaining in the ship at the time (Ins. Br. 47). There was a small amount of steel plate and general cargo in the ship, the small amount of which can be determined by inspecting the vessel's log for Voyage 5, showing the time spent in removing it by stevedores. But regardless of that, we have two noteworthy fac-

tors,—(1) All these experienced men regarded the inspection as complete and satisfactory. (2) The 14-foot crack which occurred on the port side during the storm was *not* in a cargo space at all. It was *in the engineroom,* and Mr. Wilson testified that he inspected "the *engineroom* and the boiler spaces" (Tr. 769).

Commander Brown was the *hull* inspector for the Coast Guard, and his testimony is particularly noteworthy because it is a crack in the side of the *hull* that we are discussing. He explained that he examined not merely the underwater body, but the sides of the ship as well,—the "whole hull' "from the keel up to the deck" and "from stem to stern" (Tr. 733, cf. also 735-736).

To sum it up, these men went all over the vessel, examined all her plates, seams, welds and everything pertinent to a complete hull examination, had hammer-testing hammers along to use on anything that looked suspicious, examined not merely the underwater body, but the whole hull, and found the vessel completely seaworthy in every respect. They were all competent, qualified men of long experience.

No witness has suggested what other kind of inspection should have been made, or that it would have discovered anything.

A few statements in opponents' briefs remain to be answered, and then we are done with this subject of the hull's alleged notch-sensitivity and Vallet's privity with it.

On page 40 of the Insurance brief it is said that the

vessel, prior to her purchase, had sustained "serious and extensive damage to hull and frames"; that Vallet knew of this; and that when steel "is indented to any serious extent" is become subject to "strain aging" and eventually to notch-sensitivity.

The answer to this is two-fold:—

(1) The damage previously sustained by the vessel was nothing unusual, but more or less of the type suffered by all vessels in the routine of their service (Tr. 2746, 2871) and was all fully and completely repaired so that the vessel at the time of her purchase by petitioner was, as shown by the Condition Survey, and as testified to by all, without contradiction, as good as before, and complete seaworthy.

(2) The only "indented" plates anywhere near the crack subsequently developing between Frames 93 and 94 were shell plates J-9, J-10 and J-11. J-9 and J-10 were not even close to it. The after end of J-11 butted on the girth seam where the crack started, but all of these plates, including J-11, were *renewed*. They were not faired in place. They were taken out and *new ones* put in their place (Tr. 605, 606, 2583-4, 2614). The possibility, therefore, that any indented plate could have undergone strain-aging at this point must be eliminated. Incidentally, the weld where Plate J-11 butted on the girth seam which ultimately cracked was thoroughly inspected by Commander Rivard, hose-tested and found to be good (Tr. 612-613), and survived five arduous trans-Pacific voyages and a drydock inspection without disclosing any defect.

Another item requiring brief comment occurs on page 45 of the Insurance brief, where it is said that the drydock inspection was not availed of "to determine the *effect* of the Voyage 5 Class I hull fracture upon the structural integrity of the vessel's hull". This is a recurrence of an idea that we disposed of in our opening brief. The Voyage 5 22-foot crack would have no "effect" on the structural integrity of the vessel, particularly no effect on the hull some 90 feet away where the crack subsequently occurred in the port side. Vallet testified and was supported by others that the 22-foot crack would *relieve* stress tensions on the deck at that point, and when repaired the ship would be better than before. Not even Hechtman claimed that the Voyage 5 crack would have an "effect" on the structural integrity of the hull. The most he could claim for it was that it "could be" *evidence* of a strain produced by the previous alleged hogging (Tr. 2603).

Finally all agreed that strain-aging, which produces notch-sensitivity, can only occur, as its very name implies, after an "age" has gone by. It takes time to develop. As Mr. Brown said, it occurs where material has been strained and "allowed to age" (Tr. 2747), and Mr. Hechtman added the same qualification. He said it occurred where material has been permanently deformed and "a period of time has elapsed" (Tr. 2370). It is obvious that the period between November, 1951, when the deck crack occurred, and January 9th, 1952, when the port side crack occurred, is too short a time for any "strain-aging" to take place.

For these many reasons it is clear that the deck crack could have no "effect" on the vessel's "structural integrity". This is the same error into which the Trial Court fell when he said that the "crack sensitiveness of the vessel" was "by reason of" the former 22-foot deck crack (Findings of Fact V, Tr. 75-6). We commented on this in our opening brief.

Finally, the Insurance brief suggests on pages 49 and 50 that since there was no deck cargo in the vicinity of No. 1 hatch (to break loose and tear off the hatches), and since water entered No. 1 hold, it must have entered through some substantial break or leak in the ship's hull or deck in the vicinity of No. 1 hold. Of course this is pure speculation. The pounding seas themselves could have smashed in No. 1 hatch, wrecked its coamings or torn off deck fittings. The violence of the seas is utterly unpredictable. Or some act of the crew, after leaving port, may have created an opening or left off some fastening in the forward part of the ship. This is all pure speculation. (See our opening brief, pp. 108-9.)

The brief suggestion is made on page 39 of the Government's brief that the petitioner could not depend on inspections by the Coast Guard or marine surveyors because petitioner could not delegate its duties. This is, of course, not true. The marine surveyors and the A.B.S. surveyors are employed by, and are agents of, the petitioner (Tr. 2760-62). The rule about delegation is well understood, A corporation, of course, can act in no other way than through delegation. It can delegate its

duties to use due diligence, and if its delegates do so, the shipowner has done all he can, and is exonerated. This rule of delegation applies to the Harter Act and COGSA cases. In limitation cases, however, the rule is broader. The shipowner can delegate all his duties regarding the ship, and if he selects competent men as delegates, he is exempt from liability, even should they fail in their duties, provided he is not personally aware of their failure and does not sanction it. This Court knows that there are many cases where the shipowner's reliance on the Coast Guard and American Bureau has been upheld by the courts:

The Zarembo, 44 F. Supp. 915, 919.
The Floridian, 83 F. (2d) 949.
The Amelia, 13 F. Supp. 7.
The Troubador, 88 F. Supp. 207.

Finally, the Government brief, page 41, says that Vallet should have warned Captain Plover of the PENNSYLVANIA of the crack sensitiveness of the ship. This is pretty hard to understand. The "warning" of the crack sensitiveness, as claimed by claimants, was the 22-foot deck crack. Plover knew all about it. He was on the ship when it occurred.

PETITIONER'S ALLEGED PRIVITY

So far the discussion has all related to notch-sensitivity resulting in the 14-foot crack. Claimants try to fasten privity on petitioner through Vallet, and to a secondary and much less degree, on Brenneke.

First, as to Vallet:

It is hard to see what he did that he should not have

done, or what he omitted that he should have done. He operated under the well recognized principle of holding the ship's master, chief engineer and officers responsible for their ship, reporting to him, and he enforced that system and, by his staff, made additional inspections and diligently took care of everything thus disclosed. In fact, as to the PENNSYLVANIA, there were no adverse reports at any time except the 22-foot deck crack.

As to that crack he did everything that any mortal man could have done. His actions met the approval of all concerned, himself, his officers, the Coast Guard, the American Bureau, the repair yard, the U. S. Salvage Association, and Lloyds, and later the approval of Mr. D. P. Brown and Capt. Nordstrom. The ship when repaired was, as testified to by all, as good as before. The crack was not a warning of anything. No "tests" that he could have made would have shown anything except what Williams' own tests showed,—that the steel more than met all requirements. No non-destructive test is known. He certainly could not chop the ship to pieces to make laboratory tests of each plate.

He was not privy to the drydock inspection in Seattle, although if he had been, it would have made no difference for that inspection was good. He sent Brenneke, one of his experienced and competent assistants, to represent him there. No adverse reports were made, as indeed there could not be, since the vessel was all right.

As to Brenneke, it is plain that no privity can be fastened on petitioner through him. The only thing claimants attribute to him is the drydock inspection in

Seattle. But the proof is that that inspection was good and complete. There is no proof whatever that a further or different inspection would have disclosed any weakness in the butt weld where the 14-foot crack later developed.

That he was not of such rank in the hierarchy as to convey privity is plain. He was merely one of Vallet's staff of assistants, and as he, himself, put it in one place, —"My job mainly was to do the footwork. I was just chasing from one place to another on attendance to vessels", etc. (Tr. 322). How much "sail he packed"—to use one of his expressions (Tr. 1726)—is indicated by the Trial Court himself, who said, "He seems to be a very minor official in the organization" (Tr. 1727).

STEERING GEAR AND VALLET'S ALLEGED PRIVITY

On pages 32-39 of the Insurance brief, and pages 41 to 51 of the Government brief, the arguments go as follows:—

(1) For a time the steering gear completely failed in the storm,

(2) Because of unseaworthiness (without specifying what),

(3) Petitioner did not use due diligence.

(4) Vallet was privy to this lack of due diligence.

(5) As marine superintendent his privity is that of petitioner.

In our opening brief (pp. 102-103), we show, we believe, that the Trial Court overstated the meaning of

the radiograms when he stated that the ship was unable, for a time, to steer by any method. We also showed that the failure of steering gear in a tremendous storm is no proof of unseaworthiness at the inception of the voyage, and that the Court nowhere stated what the claimed unseaworthiness was. We will not go into that again.

We come now to the simple question of privity.

First it is contended in the Insurance brief, pages 32-3, though not in the Government brief, that Vallet was personally present and therefore privy to the hard-turning of the rod leading from the steering wheel on the poop deck down to the steering engine in the engineroom below, when some army clothing got wrapped around it, and that nothing was done to prevent a recurrence of this, and that was his personal negligence. It is suggested that "no protective shield or guard was installed, and no other action was taken to prevent a recurrence of this difficulty should the cargo shift again in the future".

No one suggested a "protective shield or guard" and no witness suggested it at the trial. It is simply a product of counsel's invention.

> "The use of that device (a fuel tank ventilator) was not required by the supervising inspector, . . . We do not think that the steamship company was bound to adopt this device, or any device not dictated by their own knowledge and experience, or that of others, or that its failure to do so was negligence." McGill v. Michigan S.S. Co., 144 Fed. 788 (C.A. 9, 1906).

The army clothing did not put the rod out of operation. It merely made it turn hard. The Coast Guard which was present approved of what was done, merely removing the clothing.

The matter is of no moment anyway because, as Matthews explained, the rod was only for steering from the exposed poop deck where no one would have stood in the storm, and the steering engine could be equally operated by a man in the steering engineroom itself (which would be the natural place in a storm) (Tr. 372-373, 376-377).

Furthermore the stowage plan (Exh. 187) for Voyage 6 shows that the after end of No. 5 hatch, through which the rod passed, was stowed with tomato juice, extinguishers, syrup, bags, flour and canned goods, in boxes or cartons, and not with any loose clothing or anything else.

Finally, the radiograms show that hand-steering gear in the room below was actually operated.

To succeed on this point claimant would have to show that inability to use this rod from the *poop deck* caused the loss and arose from Vallet's personal lack of due diligence. No such showing is possible.

It is next contended in the Insurance brief (pp. 33-8) and in the Government brief (pp. 41-49), that the inspections of the steering system of the ship were inadequate. The Government brief even went so far as to say that there was no proof that the "hand steering gear or emergency steering were even operationally tested"

(p. 44), and that "there was no evidence produced as to when the hand steering had been actually operated". Such statements as these and the whole charge that the steering gear was not adequately inspected can only have resulted from counsel's failure to remember the testimony. That testimony we shall now recall. Commander Hamilton, who inspected the steering system along with Lt. Rojeski at the Annual Inspection August, 1951, described in some detail the tests of the telemotor steering system from the bridge to the steering engine (Tr. 658-9). He then spoke of the steering station on the poop deck, which, by means of the rod referred to, operates the steering engine in the room below, and said:—

> "Q. Did you make a test of that steering arrangement?
> A. We did.
> Q. How did it work?
> A. Good." (Tr. 660-661).

He then described the steering station inside the steering engineroom itself, and said:

> "Q. Did you make all these tests on this ship that you have described?
> A. Between the two of us with the officers aboard the ship; yes, sir.
> Q. And the result was what?
> A. The steering engine was in good condition.
> Q. Did the Chief Engineer assist you in this?
> A. The Chief Engineer made all the changes, started the motors, stopped them, and made any changes necessary to operate the steering engine from all stations." (Tr. 661-662).

He also described the hand-powered pump that can be used to maintain hydraulic pressure on the steering-engine rams if the electric motors, which normally per-

form that function, fail (either one of the motors is sufficient), and testified:

"Q. Was that in working order?
A. Yes, sir." (Tr. 668).

Similarly Lt. Rojeski, at the same annual inspection, referring to the entries in his inspection book, testified:

"Q. What does the record show there as to your tests and the condition you found the steering engine to be in?
A. Well, the steering engine tested and found in working order: 'Yes'.
'Steering gear examined from pilothouse to rudderhead and found in good condition, Yes.'
'Hand auxiliary steering gear tested and found in good working order and efficient, Yes.'
Q. What condition did you find the steering—the whole steering apparatus of the ship to be in, all-inclusive?
A. Good, sir." (Tr. 708).

Mr. Miller, the American Bureau Surveyor, testified that at the annual survey in August, 1951:—

"A. I examined the steering arrangements, which consisted of the telemotor, hydraulic pumps and the drive motors, emergency gear, and found them in a satisfactory condition." (Tr. 411-12).

Chief Engineer Matthews testified that he was responsible for the proper functioning of the steering apparatus, and then as follows:

"Q. And as such on Voyage 5, did you make inspections of the steering gear from time to time?
A. Yes, and inspections are also made every watch.
Q. By whom?
A. By the man oiling the steering engine.
Q. By the what?

A. By the man oiling the steering gear.

Q. In your inspections would you have occasions to go aft of the steering engine room?

A. I would go aft every day. I would inspect everything every day, all of the equipment that is running." (Tr. 350-1).

Finally, the log books which are in evidence show that on Voyages 1 through 5 no less than *sixty-five* operating tests were made of the steering engine and/or emergency steering gear from February 18th, 1951, to December 13th, 1951, six of which were conducted subsequent to November 16th, 1951, the day on which the extension-rod from the after steering station was freed up, the last of which entries is as follows:

"From Moji Thursday, December 13, 1951
To Vancouver, B. C.
1620 Turned emergency wheel over Hard Right & Hard Left All in Order. G. E. Elliott."

The foregoing shows that counsel's memory is faulty when they say that no adequate, complete inspections were made, particularly, as the Government brief says, that there was no evidence of tests other than those described by Commander Hamilton, and that these did not even show that the hand steering gear or the emergency steering were even "operationally tested".

Both briefs, however, direct their main attack on petitioner's supposed failure to prove that the steering engine and particularly its hydraulic pumps had ever been opened up for internal inspection. To understand this a little better, reference should be made to some testimony of Commander Hamilton, where he said that, on an annual survey, pumps are not opened up unless it

proves, in operating them, that they are not in good working condition:

> "Q. So that if it does operate all right when you watch it you do not open it up?
>
> A. Except on the four-year survey. It is not required at the annual inspection." (Tr. 687).

Commander Hamilton is here referring, not to any Coast Guard Regulation, but to the four-year Special Survey required by the American Bureau if the vessel is to be retained "in class". The distinction should be noted between a "survey" and an "inspection". "Surveys" refer to American Bureau surveys; "inspections" refer to Coast Guard inspections. The Coast Guard does not make four-year special inspections, but only annual inspections, unless something special develops. The American Bureau special surveys made at intervals of approximately four years are denominated "special Survey No. 1", "Special Survey No. 2", "Special Survey No. 3", and so on. We believe this Admiralty Court is familiar with all this.

It is not clear from the context of Commander Hamilton's testimony whether he is talking about pumps in general all over the ship or pumps at the main steering engine, but counsel have assumed that he is talking about the latter, and therefore we shall go along with them on that basis.

Now it is true petitioner did not offer any proof of the 4-year special survey, and its concomitant opening up of the steering engine and its pumps. This occurred two years before the petitioner bought the ship. It

would be going further than anything we have ever heard of in some forty years of admiralty practice to require a shipowner to prove, in order to show due diligence, that all surveys had been made and all due diligence shown by the previous owner for years back. Especially when the ship's current certificates show her to be "in class" and in all respects fit. The law does not go to such extremes. It only requires due diligence to make the ship seaworthy at the inception of the voyage, which certainly, by any stretch of the imagination, should not go back to a period before the shipowner even owned the ship. So we furnished no proof. And the matter was not even brought up at the trial. It is an afterthought now.

If, however, such proof is desired, claimants have supplied it for us. For if the Court will turn to their own Exhibit 147, which is a collection of American Bureau surveys which they introduced, the Court will find Report No. 8815, dated at San Francisco, California, February 3, 1949, and being the "Completion of Special Periodical Survey of Machinery". It is there stated in Item 3:—

> "Hydraulic pumps on the steering gear were opened and examined; rams and cylinders examined and all found satisfactory. Steering gear was tried out under working conditions and found to operate satisfactorily."

To conclude:

The Trial Court has not found what the supposed defect in the steering apparatus was; or that it existed at the inception of the voyage; consequently, no one can

say what caused the loss in this respect, nor that due diligence was lacking. On the contrary, the proofs show due diligence.

But casting all that aside, Vallet's lack of privity is clear. The only incidents he personally came in contact with were the inconsequential freeing up of the poop-deck steering rod when it was fouled by the army clothing and the annual survey in August; though not directly making examinations himself, that survey and inspection being the province and duty of the American Bureau and the Coast Guard. It was *their* survey, and *their* inspection,—not his.

He worked under a system of holding his ship's officers responsible. They never made any adverse reports to him of any trouble with any part of the steering gear. There is no possible privity.

SECURITY OF THE HATCHES AND STOWAGE OF DECK CARGO

The Insurance brief discusses these matters on pages 50-58, and the Government brief on pages 51-9. The substance of their charges is that the forward hatches were not adequately secured and the label cargo should not have been carried on the forward deck. It is even suggested that no deck cargo should have been carried at all.

We have discussed these matters in our opening brief on pages 44 to 73, and shall not repeat that discussion. We confine ourselves to "privity".

We shall answer the Insurance brief first. It claims that with bilge strainers covered by burlap there would be no way of pumping water out of the hold; that therefore additional precautions should have been taken to secure the hatches, and that this would have included the use of chafing gear to prevent *cross-battens* from cutting the tarpaulins, that Modern Ship Stowage (Exh. 172) specifies the use of chafing gear, and that none was aboard the PENNSYLVANIA, and this was Vallet's personal negligence (p. 52).

Incidentally, burlap coverings over the bilge strainers are the common practice to prevent grain from entering the bilges. This burlap would not prevent any ordinary water that leaked down through the grain from entering the bilges if the water got that far and was not absorbed in the grain itself. Of course with a whole hold full of water, the point becomes immaterial.

But now regarding the charge that no chafing gear was aboard, there is no testimony whatever to support this. Counsel must base that statement on some testimony of Mr. Vallet's where he was enumerating various items making up the covering of a hatch (Tr. 307), and did not specifically mention chafing gear, nor was he asked about it. But the omission to mention it means nothing. Chafing gear is nothing but old rope, rags, sacks, or anything to prevent the chafe. It can be picked out of any of the ship's stores and is not a regular part of the hatch appliances. Contrary to the statement that no chafing gear was aboard, is the clear implication in Mr. Vallet's subsequent testimony that it was. For when

he was asked whether cables across the hatch in heavy seas would not tear the tarpaulins, he said,—

> "A. Not if a suitable chafing gear is placed in the way of the cables." (Tr. 308).

Furthermore he had testified elsewhere that the ship was fully and completely supplied (Tr. 291). Chafing gear would be among the supplies. It is inconceivable that the ship had no extra rope or canvas, bags, sacking or many of the miscellaneous items that could be used as chafing gear. "Knights Modern Seamanship", 10th Edition, defines "Chafing Gear" as "A guard of canvas or rope around spars or rigging to take the chafe", and a "Chafing Mat" as "A mat woven from strands of old rope and used to prevent chafing" (p. 787).

Even if you accept the impossible that there was no chafing gear aboard, Vallet would not be privy to such a fact. That would be the province of his ship's officers on whom he relied.

The whole thing is an after-thought, never brought up at the trial and now advanced for the first time.

Counsel is mistaken in saying (Ins. Br. 52) that Modern Ship Stowage specifies chafing gear to prevent the *cross-battens* from wearing or cutting the tarpaulins. Modern Ship Stowage says nothing of the kind. It cites some Underwriters' Rules that chafing gear should be used under *wire cross-lashing;* which is what Mr. Vallet said. In fact the use of cross-battens instead of cross-lashings, eliminates chafing gear.

It is next suggested that Mr. Pitzer was negligent

in making the ship available to the Army to carry any deck cargo at all, and particularly the label cargo forward, and that Pitzer was privy to this. What we have said in our opening brief, and this brief, sufficiently answers this. Even in a commercial operation Pitzer did not occupy a position high enough to transmit privity to the Company, and in this case, he did nothing at all except possibly inform the Army that the vessel, except for the lower holds where barley was, was available to them for loading under their contract. He made no decisions where any cargo was to go, and did not know where it went. The suggestion that he must have known where the label cargo was, from the reports of the supercargo on the ship to the Seattle office, and so on to Pitzer in Portland, even if it were material, is without foundation. The supercargo apparently reported only how the loading was progressing so the Seattle office would know when the ship was likely to depart. He did not even report to the manager of the office, but to a Mr. Graham, an assistant (Tr. 1162-63). Even if Pitzer had known of the deck cargo, it would not have made any difference. That was up to the Army and the Master.

> "The amount of the deck cargo shall be at the discretion of the Master and the loading (when performed by the Government or its Agents) and carriage thereof shall be at the risk of the Government." (Exh. 132-B).

CROSS-BATTENS

It is next contended that the cross-battens on the hatches were bent and that this was the personal fault of Vallet.

We discussed this in our opening brief (pp. 119-120), and there showed that they were not bent or defective. We did not quote the testimony which showed this, but cited it, viz., Allison (Tr. 1091-4), Captain A. B. Johnson (Tr. 1188-1208) and Captain Sheldrup (Tr. 2697). We refer the Court particularly to the testimony of Captain Sheldrup because he was the Government's own supercargo, was right at Hatch No. 1 when they opened it and rebattened it, and was right at No. 2 Hatch after it had been battened, and found the cross-battens all right. We quote Sheldrup's testimony in part:—

> "Q. Are you familiar with the so-called crossbars or cross battens with which Victory ships are fitted?
>
> A. Yes.
>
> Q. In connection with the securing of the hatches?
>
> A. Yes, I am.
>
> Q. Have you seen them?
>
> A. I have seen them on all ships, yes.
>
> Q. Let's take No. 1 hatch. Do you recall whether or not that night you had occasion to reopen and put any cargo into No. 1 hatch prior to the vessel sailing on the morning of January the 5th?
>
> A. The No. 1 hatch was intended to be finished on the day shift. However, there was some space left in there, and we thought we were going to leave it that way—the day crew did—so they left it that way and the crew battened that hatch down.
>
> Q. Yes.
>
> A. And then towards night, well, I saw where we needed more space so I told—the boatswain was

on then, and I told him we might have to open it up again. He said, 'Fine'; it would be all right; go ahead.

We battened it down in the morning, and towards three or four in the morning I saw we needed that space, and I went down in there.

Q. Did you see that No. 1 hatch unbattened and opened up so you could put more cargo in it?

A. That is right.

Q. I will ask you whether or not you saw the batten bars on the No. 1 hatch at that time.

A. They were on there then.

Q. I will ask you whether or not they were bent, twisted, buckled or otherwise deformed.

A. As far as I could see, there was nothing wrong with them.

Q. How far away were you from them?

A. Well, I was on there when we opened them up.

Q. Was there any difficulty in opening them?

A. No.

Q. If they had been bent, twisted, broken or buckled could you have seen it?

A. Well, I probably would notice that.

Q. Why would you notice it?

A. Well, for one thing, I always pay attention to the hatches, being my main job for many years when I was sailing. And also when you open up again, why, any delay of time I have to keep a record of it.

Q. Was there any difficulty in opening that No. 1 and rebattening it?

A. No.

Q. With respect to Hatch No. 2, Captain Sheldrup, during the evening and early morning prior to the vessel sailing January 5th, did you have occasion to be on or around No. 2 hatch?

A. No. 2 was battened down when I came down.

Q. That would be on the evening of the 4th?

A. It was during the day shift; that is, the crew did it right after——

Q. Did you have occasion to be on the hatch, to see it and to be around it during the night and early morning of the 5th?

A. Yes, I was right there when they lashed—they had to lash that acid right by No. 2, so I was right there.

Q. I will ask you whether or not you on that occasion observed any bending, twisting, buckling or any deficiency in the batten bars on No. 2 hatch.

A. No, I did not." (Tr. 2694-6).

We note the suggestion, rather faintly made in both briefs, that a deck load of heavy timbers on Voyage 5 had come loose and drifted around on the forward deck (Ins. Br. 56) (Govt. Br. 54), implying that this drifting deck load had damaged the cross-battens on the hatches. Photographs, however, taken by a sailor on that voyage and introduced by claimants themselves as Exhibit 149, 1 to 5, show clearly (a) the lumber deck load was built adjacent to the hatches, not on or over them, (b) the hatches were clear of any lumber and showed the cross-battens in place, undisturbed after the storm, (c) the chain lashings of the deck load itself in place with only a few pieces of lumber on the top tier on the port side abreast of No. 3 hatch moved slightly—not "drifted all over" as the witness had testified. None of the pictures shows any part of the deck load lying on the hatches or cross-battens or out of the grip of the lumber chain-lashings. They show only that a light "catwalk" built over the starboard deck load was washed overboard by heavy seas.

As a matter of fact there is no requirement that cross-battens be used at all. They are simply an additional precaution taken by this petitioner like the addi-

tional precaution also taken by this petitioner of using the third tarpaulin for each hatch.

The Trial Court made no finding that the cross-battens were bent or twisted, or in any way defective. In fact he made no finding at all adverse to the security of the hatches.

Finally as to privity, it is plain that Mr. Vallet had nothing to do with this. It was a matter for his ship's officers, as Matthews himself testified. If anything were wrong with the battens, it would be the duty of the mate to report to the chief engineer, and the chief engineer would fix them.

Turning now to the Government brief, it begins by invoking Title 46 of the Code of Federal Regulations, § 144.10-80, which reads as follows:—

> "Security of Hatches. (a) Vessels carrying loose grain in bulk shall have suitable means of securing hatchways and other weather deck openings. Hatch covers and their supports shall be in good condition and properly battened down using good and sufficient tarpaulin, cleats and wedges where necessary."

It is hard to see why counsel cite this, for the testimony shows that the hatches complied with every word of this requirement. But regardless of that, this regulation was not promulgated until October 10th, 1952 (17 Fed. Reg. 9529), to be effective November 19th, 1952 (17 Fed. Reg. 5672), some eleven months after the loss of the PENNSYLVANIA. The attempt therefore, on page 52, to show statutory fault and invoke the Pennsylvania Rule fails.

The Government brief beginning on page 55, repeats the charge that Mr. Pitzer made the "decision" to carry deck cargo (page 55), and "the acid cargo was carried on the forward deck with the knowledge and therefore the privity of the Petitioner" (page 59).

We have already answered this. In the first place, it was properly carried. It *had* to be carried on deck under Coast Guard Regulations. It was the decision of the Master and the petitioner had nothing to do with it, and there is no proof that it was this cargo which came adrift and took the tarpaulins off the hatches.

To conclude: The hatches were well secured; the cross-battens were good; chafing gear, through not necessary for cross-battens, was aboard; the deck cargo was proper. The Trial Court did not find anything specifically against either the hatches or the cargo. Neither Vallet nor Pitzer was privy to any of these things.

CREW

One final comment on the Government's brief. It is there stated on page 63 that no sufficient explanation was ever made of the fact that petitioner's Marine Casualty Report (Exh. 24) showed only five ablebodied seamen, instead of six, the inference apparently being that the vessel sailed with one A.B. short of the required number. Although immaterial, we cannot let this pass unchallenged. The record contains a full and complete explanation. We refer to the testimony of Crockett (Tr. 774-782) and Trenholme (Tr. 934, 940). From this it appears tht a clerk in the Claims Department of the

petitioner made up the Marine Casualty Report (which must be done promptly, Tr. 781), taking his information from a payroll (Exh. 58) of the Company. This was before the official crew list (Exh. 25) had been received from the Customs. That payroll listed five A.B.s and four deck-maintenance men, one of whom was a seaman named Vaisenan. This was an error. Vaisenan should have been listed as an A.B. and the error was corrected on the payroll, but in the meantime the Marine Casualty Report had been made up and the correction was not made there. The official crew list and the Shipping Articles both show the true fact that Vaisenan and five others were A.B.s, and the crew was complete (Exhs. 25 and 75). It would not affect privity anyway.

CONCLUSION

It is a human tendency, which even judges, being human themselves, have to guard against, to seek out and fasten fault on somebody after an injury or loss. We like to find somebody to blame, and hindsight is the handmaiden of that propensity. It is a severe and unjust way of judging against which the Admiralty Courts have often warned us.

Yet even by that severe standard, it is hard to read the testimony in this case and find anything the petitioner did wrong. Certainly it is impossible to do so, if we look at these matters, as the courts say we must, not with the critical eye of hindsight, but as they appeared to the actors at the time.

The record is one of scrupulous and unremitting care, where even scrupulous and unremitting care could not avail against the overwhelming might of the seas in one of the greatest storms on record. (See Clark v. States Steamship Company, 1956 A.M.C. 2055, D.C. Cal.)

These remarks may seem to pertain more to exoneration than to limitation. And, in a way they do. But only partly so. They pertain to limitation too. For before limitation can become a subject of inquiry, liability and the *cause* of liability must be found. It is only then we pursue the further subject of limitation.

Now it is true the Trial Court has found liability. We have discussed that in our Opening Brief, and shall

not renew it here. It is enough to say that we believe that finding is clearly erroneous, and that this Court will reach the same conclusion. If so, then of course there is an end of the matter.

But now suppose we are wrong. What then is the question confronting this Court? A very simple one. Only this: Contrary to the Trial Court's conclusion that the PENNSYLVANIA must have been unseaworthy because she sank, while others did not, his finding of petitioner's lack of privity is a distinct finding of *fact* based on ample evidence. And the only question before this Court is: Is that finding of *fact* clearly erroneous.

We confidently submit that it is not.

Respectfully submitted,

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No. 15,131

IN THE

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation,	*Appellant,*
vs.	
UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
ATLANTIC MUTUAL INSURANCE COMPANY,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
PACIFIC NATIONAL FIRE INSURANCE COMPANY,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA,	*Appellees.*
UNITED STATES OF AMERICA,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,	*Appellees.*
THE DOMINION OF CANADA,	*Appellant,*
vs.	
STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court
for the District of Oregon.

ANSWER BRIEF OF APPELLEE UNITED STATES OF AMERICA.

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THE DOMINION OF CANADA,	*Appellant,*
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STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA,	*Appellees.*

Appeals from the United States District Court for the District of Oregon.

ANSWER BRIEF OF APPELLEE UNITED STATES OF AMERICA.

The Government, as appellant herein, having filed its brief in support of its appeal from that portion

of the interlocutory decree of the District Court which granted limitation of liability, now, as appellee, in support of that portion of the interlocutory decree which denied exoneration from liability to Petitioner, files this, its answer brief herein.

QUESTIONS INVOLVED ON PETITIONER'S APPEAL FROM THE DECREE DENYING EXONERATION.

The Petitioner, in its brief in support of its appeal from that portion of the decree of the lower court denying exoneration, having admitted that "What happened to the PENNSYLVANIA is known only from her radiograms" (Pet. Brief, page 11), and "that the cargo claimants having proved the loss, the burden is on the Petitioner to bring itself within one of the exemptions, i.e., perils of the sea, act of God, act of the master, latent defects"[1] (Pet. Brief, page 9), the questions presented upon this phase of the appeal are:

(1) Whether the finding of the District Court that the sinking of the PENNSYLVANIA was not caused by a "Peril of the Sea" is supported by the evidence and not clearly erroneous.

---

[1]Petitioner did not plead or urge in the District Court any claim of exemption on grounds other than peril of the sea, and its present references on appeal to "act of God, act of the master, latent defects" are probably thrown out as mere conjectures upon which Petitioner does not seriously rely. In *The FELTRE* (9th Cir.) 30 F.2d 62, 1929 A.M.C. 279, it was held that conjectures cannot take the place of proof. See also *Waterman v. United States S.R. & M. Co.* (5th Cir.) 155 F.2d 687, 1946 A.M.C. 997.

(2) Whether the finding of the District Court that the PENNSYLVANIA'S unseaworthiness at the inception of her voyage was the proximate cause of her sinking is supported by the evidence together with the presumptions and not clearly erroneous.

(3) Whether the finding of the District Court that the Petitioner failed to use due diligence to make the PENNSYLVANIA seaworthy at the inception of her voyage is supported by the evidence and not clearly erroneous.

In discussing the above questions separately the evidence and authorities supporting the District Court's findings will be cited, from which it will be found that such findings and all of them are not clearly erroneous within the meaning of opinions of the Supreme Court in *McAllister v. U. S.,* 348 U.S. 19, 99 L. ed. 20, 1954 A.M.C. 1999, and of this Court in *Permanente-Silverbow Colorado* (9th Cir.) 231 F. 2d 82, 1956 A.M.C. 695. In this connection, this Court had under consideration in *Bjornson v. Alaska S.S. Co.* (9th Cir.) 193 F. 2d 433, 1952 A.M.C. 477 the meaning of the words "clearly erroneous" as used in the Federal Rules of Civil Procedure, Rule 52(a), 28 U.S. Code, providing that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This Court in the opinion in that case by Judge Driver held that the expression "clearly erroneous" "* * * does not mean that the reviewing court shall determine from the record where the weight of the

evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence."

In applying the rule in this case the opinion in *Artemis Maritime Co. v. S.W. Sugar Co.* (4th Cir.) 189 F. 2d 488, 491, 1951 A.M.C. 1833, is most applicable, especially the following:

> "Whether Artemis exercised due diligence to make the vessel seaworthy is a question of fact. We can, accordingly, reverse the District Court here only if we hold the District Court's finding was clearly erroneous. We cannot so hold, therefore the judgment of the District Court must be affirmed."

See also *Pacific Portland Cement Co. v. Ford Machinery & Chemical Corp.* (9th Cir., 1950), 178 F. 2d 541, and *Lerner Stores Corp. v. Lerner* (9th Cir., 1947), 162 F. 2d 160.

ARGUMENT.

I.

THE DISTRICT COURT'S FINDING THAT THE STORM IN WHICH THE PENNSYLANIA SANK WAS NOT A "PERIL OF THE SEA" IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

The District Court's finding that the storm in which the PENNSYLVANIA sank was not of such magnitude or so catastrophic as to constitute a "peril of the sea" is fully supported not only by the radiograms themselves but by the testimony of Petitioner's witnesses, including both Captain Dyer, the Petitioner's

Marine Superintendent (R. 2569-2570), and Mr. Vallet, who took Captain Dyer's place as Marine Superintendent while Captain Dyer was ill during the latter part of 1951 and the early part of 1952 (R. 189-191). Captain Dyer testified by deposition that he had masters papers, any tonnage, any ocean, that he had been at sea and had often sailed the North Pacific. At page 2582 of the Record, he testified as follows:

> "Mr. Levinson. From your experience as a Master Mariner and as Port Captain, a Force 9 wind with heavy and confused seas is nothing unusual in the North Pacific in January, is it?
> A. No."

Mr. Vallet, Petitioner's Marine Superintendent who had sailed as a Chief Engineer for 20 years (R. 139) testified (R. 180-181) that the welding in the freeports in the bulwarks was because of

> "Q. Heavy weather in the North Pacific or in the Gulf of Alaska?
> A. That is right",

and (R. 189),

> "A. Well, we have heavy weather damage on practically all the voyages".

When asked about the following weather (R. 190):

> "Force of winds 7 to 8, 8 and 8 to 9, seas described as follows, 'very rough west by south sea, long high west by south swell, very high swell, heavy confused west—heavy confused south to west swell, vessel rolling and pitching heavily at times, seas too rough to maintain original course * * *"

Mr. Vallet stated (R. 191):

> "A. That is just a vessel going through a regular storm which happens practically on all voyages."

The District Court's finding that the storm in which the PENNSYLVANIA sank was not a "peril of the sea" is also supported by the testimony of Captain Harry Johnson (R. 2432) where he stated that from his experience in sailing the North Pacific, bad weather could be expected along the Great Circle Route from Seattle to Japan in January with a force wind from 6 to 10 and sometimes up to 12 (R. 2432). To the same effect was the testimony of Captain Frederick Ulstad (R. 2215-2216).

The force of the winds was stated in the radiograms from the PENNSYLVANIA as "WINDS WNW 9. VERY HIGH WESTERLY SEA" (Exh. 127). According to the Beaufort Scale force 9 is a strong gale of 41 to 47 sea miles per hour. Of all the vessels in the area, sixteen in number, the closest to the PENNSYLVANIA was the KAMIKAWA MARU, which was approximately 100 miles from the PENNSYLVANIA, the other vessels being over 200 miles. The testimony of Captains of these vessels was that they encountered heavy weather in January crossings in the North Pacific. Captain Maeda, of the KAMIKAWA MARU, stated that he had seen storms of the same severity two or three times in his experience (R. 535), and that the only damages sustained by his vessel in the January, 1952, storm were damages to the bulwark rail and some engine damage

resulting from forcing the engines in going to the aid of the PENNSYLVANIA. He further stated that he had, on his winter crossings of the North Pacific, encountered winds of force 11 and once a wind of force 12.

Captain Mori of the KOTOH MARU, which was 182 (R. 1530) to 232 miles (R. 1506, 1533) distant from the PENNSYLVANIA, testified that the storm from January 7th through January 9th, was a big storm, (R. 1512): "Q. Big storm. A. Yes, but in winter times North Pacific Ocean, sometimes we expect the same kind of storm then", and further (R. 1513) that there was no damage caused to the KOTOH MARU. He also testified (R. 1517) that: "Q. Do I understand that after you had members of your crew tighten down, cinch up the battens, that you turned around and resumed your course. A. Yes." He further testified (R. 1519) that a seaworthy vessel, fully loaded could stand for such kind of weather, and that (R. 1515) he encountered the same kind of a storm on April 24th of 1952 with wind WSW of maximum force 11. Captain John W. McMunagle of the Canadian weather Ship STONETOWN (Referred to as Weather Station Papa) which vessel was approximately 205 (R. 1970) miles southwest of the PENNSYLVANIA on January 7th, 8th and 9th, 1952, testified (R. 1993):

> "Q. Captain what would you say would be the usual and expected weather for the vicinity of weather station PAPA in the winter months? A. Well, you can expect very rough seas and gales of varying degrees of intensity practically

throughout the winter. Q. Was there anything unusual or unanticipated about the weather conditions that existed in the month of January 1952 in the vicinity of the weather station PAPA? A. No."

He further stated (R. 1981) that on winter patrol in the same area on January 19-21, 1951, they had winds of up to Force 11 (R. 1980, R. 1982), and (R. 1973) that the STONETOWN suffered no damage up to January 11, 1952.

There is great similarity in the testimony of the witnesses in connection with the sinking of the PENNSYLVANIA and that of *The VESTRIS* (S.D.N.Y.), 60 F. 2d 273, 1932 A.M.C. 863, where the District Court in finding that the sinking of *The VESTRIS* was not occasioned by a "Peril of the Sea" referred to the testimony of witnesses as to the weather describing winds of force 9 and 10 and to the testimony of officers from some of the other vessels in the vicinity of *The VESTRIS,* as follows (p. 278):

> "Testimony too voluminous to analyze here in detail has been offered regarding the weather and the experiences of other vessels in the general vicinity of the VESTRIS. There is considerable variation in the descriptions of the weather and sea. All agree, however, that the wind increased during Sunday afternoon and was at its height Sunday evening and subsided soon after midnight; that on Monday morning the wind had gone down and the weather was fair, although there was a heavy swell. Third Officer Welland, who was called as a witness by the petitioners, testified that at 7:30 p.m. Sunday the wind was

between force 9 and 10 on the Beaufort scale, and that during the evening it increased to up to force 10, with a high sea running. Welland's testimony impressed me as being reliable and after considering all the testimony in this respect, I think his statement as to weather conditions is substantially correct. Officers from some of the other vessels in the general neighborhood of the VESTRIS, although none were very near, testified that the wind reached force 12 Beaufort scale. Whether they are right in this or not, no other vessel—and some of them were small—suffered any serious damage. U. S. Weather Bureau Officials who regularly prepare weather charts from radio reports from vessels and other sources described it as a severe Atlantic storm but not a hurricane. The weight of the testimony justified the conclusion that the storm which the VESTRIS encountered was no more severe than is reasonably to be anticipated at that season of the year on a voyage from New York to South America; it was not extraordinary and should not have caused serious difficulty for a stable well-found ship. It does not fully account for the loss of the VESTRIS which, in my judgment, was due to her not being in proper condition to pass through it safely and which she otherwise would have."

The opinions of the expert weather witnesses referred to in pages 33 to 50 of Petitioner's brief can be shortly dealt with, first by citing the case of *Sartor v. Arkansas Nat. Gas Corp.,* 321 U. S. 620, 88 L. ed. 967 at page 972, and the cases therein cited, in which Mr. Justice Jackson in referring to the testimony of expert witnesses states the general rule that:

> ". . . But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory board." . . . (Citing many authorities, including the admiralty case of *The CONQUEROR,* 166 U. S. 110, 131, 41 L. ed. 937, 946.)

If the opinions of these experts although considered were not accepted by the District Court, there would be no error in so doing.

Next, in considering the testimony of the experts, is the fact that one of the experts, Dr. Rattray, the oceanographer, testified (R. 1584) that he investigated fifteen storms and that he knew of no report of the loss of any vessel in all of these storms, which covered the period from 1924 to and including the so-called Pennsylvania Storm in January, 1952, except the loss of the PENNSYLVANIA, which was the only vessel lost in that storm in which there were seventeen vessels reporting in the area.

In considering the weather to be expected in North Pacific crossings in January, two cases in the District Court of California should be noted: *The ARAKAN,* (D.C. California, Kerrigan, J.) 11 F. 2d 791, 1926 A.M.C. 191, and *The INDIEN* (D. C. Cal.) 5 F. Supp. 349, 1933 A.M.C. 1342 aff'd. (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, both involving storms in the North Pacific of as great a magnitude, if not greater, than that encountered by the PENNSYLVANIA. It was

held in both cases that the weather was to be expected and not a "peril of the sea". The language of Finding III (R. 74) is similar to that appearing in *The ARAKAN* decision which also shows that the so-called Pennsylvania Storm, if not actually anticipated, was of a kind to have been reasonably expected in January on trans-Pacific voyages over the Great Circle Route. In *The ARAKAN,* supra, the Court says:

> "Claimant's initial position is that the leakage resulted from 'heavy, tempestuous, and extraordinary' weather, amounting to a peril of the sea, which as such would be excused by the provisions of its bills of lading. This defense, to say the least, is without novelty; it is the carrier's best though least dependable friend. Judged by well-known and usually adopted tests, it must fail in this case, because it is apparent from the evidence that the weather encountered by the vessel, if not actually anticipated, certainly was of a kind reasonably to have been expected on a trans-Pacific voyage, and hence not a peril of the sea. Charlton Hall, 285 Fed. 640, 642; Benner Line v. Pendleton, 2 CCA, 217 Fed. 497, 503, affirmed, 246 U. S. 353. There was, in brief, nothing 'catastrophic' about it. Charlton Hall, supra; Rosalia, 2CCA, 264 Fed. 285, 288."

In *The INDIEN* (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, Judge Sawtelle in affirming the decree of the District Court (McCormick, J.) 5 F. Supp. 349, 1933 A.M.C. 1342, described the weather encountered by the INDIEN in her north Pacific voyage as follows:

> "On February 7, the ship ran into a North Pacific winter storm. The weather increased in

severity on February 8 and 9. Moller, the first officer of the Indien, testified that on the latter date the velocity of the wind 'was along sixty miles (an hour) generally, and up to ninety miles in the gusts.' Capt. Moloney, a marine surveyor, with a third of a century of maritime experience, declared that on a North Pacific voyage in the winter months, a 'vessel is continually shipping heavy seas * * * on her deck,' that February is considered one of the three worst months in those waters, that 'there is nothing else to be expected except heavy gales,' and that it is 'a very stormy passage.' "

Judge McCormick in the District Court in his opinion, affirmed by this Court held that this weather described in the opinion above quoted was to be anticipated and held in effect that this did not constitute a peril of the sea saying at page 353 of 5 F. Supplement, 1933 A.M.C. at 348:

"There is no satisfactory evidence that the seas that the Indien had encountered during the voyage were not to be expected on the North Pacific route at that time of the year. Mariners who had navigated there previously testified that many sea catastrophes had occurred there and that violent storms were to be anticipated. The damages cannot be attributed to dangers of the sea or to causes beyond the respondent's control."

Turning to the decision in the Second Circuit in the case of *The TURRET CROWN,* (2d Cir.) 297 Fed. 766, the Court there says, at page 776:

"The court below found that the weather encountered was not exceptional, but was what was

to be expected on a North Atlantic voyage in February. The strongest wind recorded during the voyage was a strong gale. The log entries show a light wind in the afternoon and at night, the wind rising to a strong breeze in the afternoon and evening of February 25th, a moderate gale in the early morning of February 26th, and fresh to strong gale in the afternoon. The only evidence of exceptional weather on February 26th was the Weather Bureau at Whitehall street, in New York City, where the wind was stated to have a force of 81 miles per hour for five minutes only. No log entry on the ship shows this strong wind. The ship at that time was over 150 miles out to sea. During the three-day period—February 25th to 27th, inclusive—the highest wind velocity recorded in Philadelphia was 36 miles, and that at New Haven 41 miles. These latter records show the unreliability of the New York record as a guide for a ship this distance at sea.

"The mere fact that the vessel encountered heavy weather is no defense to the claims for damage to cargoes, if any defect or unseaworthy condition of the vessel existed. The Rosalia (C.C.A.) 264 Fed. 285. The real difficulty with the sea was in the inability to have the vessel under control, owing to her defective steering gear. It is significant that the first mention of seas coming aboard the vessel follows after the entry of trouble with the steering gear in the log. A vessel which is not under control, it is testified, will suffer more from the seas than a vessel which is under control. We see no excuse in the weather."

The case of *The TURRET CROWN* is so applicable in the present case as it particularly points to

the effect of the failure of the steering gear, it being therein pointed out that, like the advices in the radiograms from the PENNSYLVANIA, that in *The TURRET CROWN,* supra, "the first mention of seas coming aboard the vessel follows after the entry of trouble with the steering gear in the log. A vessel which is not under control, it is testified, will suffer more from the seas than a vessel which is under control."

In *The GEORGIAN,* 4 F. Supp. 718, 1933 A.M.C. 1540, aff'd by the Second Circuit in 76 F. 2d 550, 1935 A.M.C. 556, the District Court, in holding that a strong gale with wind force of 9 and a whole gale of wind force of 10 did not constitute a peril at sea, said (p. 725):

> "The vessel encountered two severe storms during the voyage, the first on March 28th, 29th, and 30th, when the vessel was north and east of Hatteras, and the second on April 6th, 7th, and 8th, when the vessel was 'considerably southeast' of the Newfoundland Banks. According to the estimate of the ship's officers, the first storm reached a wind force of nine, which is rated on the Beaufort Scale of Mariners as a strong gale—a wind velocity of forty to forty-eight miles per hour. The second storm reached a wind force of ten, a whole gale—a velocity of fifty-six to sixty-five miles per hour. During these storms the ship labored very heavily; constantly shipped heavy seas at the bow, stern, and amidships; and had to be slowed to half speed and hauled off her course for safety. The ship's officers testified that the second storm was one of the worst they had ever encountered." . . .

"Perils of the sea mean conditions which are so extraordinary or catastrophic as to overcome those safeguards by which skillful and diligent seamen ordinarily bring ship and cargo to port in safety, that is, conditions which could not have been foreseen in the exercise of reasonable prudence, or which could not have been guarded against by exertion of ordinary human skill and experience. The Rosalia (C.C.A.) 264 F. 285; The City of Dunkirk (D.C.) 10 F. (2d) 609; The Oakley C. Curtis (D.C.) 285 F. 612; The Edith (C.C.A.) 10 F. (2d) 684."

. . . "It is true that on the voyage in question this vessel encountered rough seas and high winds so that she rolled and pitched considerably and shipped heavy seas; but at this season of the year, following close upon the vernal equinox, such gales and seas as were encountered by this vessel were reasonably to be expected in North Atlantic waters. There is nothing so unusual or catastrophic about these storms as to excuse the vessel as for a peril of the sea. Respondents are therefore liable for the entire damage done by sea water in No. 4 hold."

In holding that the weather therein described was not a peril of the sea, the Supreme Court in *The EDWIN I. MORRISON,* 153 U. S. 199, 38 L. Ed. 688 (1893), states:

"It was for them (the carrier) to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by

the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances."

In *The WEST-KEBAR* (2d Cir.), 147 F. 2d 363, 1945 A.M.C. 191, cited in Government's opening brief at page 46, the weather conditions which were held not to constitute perils of the sea are described as follows:

> "During the watch between 4 a.m. and 8 a.m. on January 11, the West Kebar's log records a wind force of 8 on the Beaufort Scale—39 to 46 miles—and for the watch from 8 a.m. to 12 m., '9-10'. Nine is a 'strong gale'—47 to 54 miles—; 10 is a 'whole gale' 55 to 63 miles . . .
>
> "The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season."

See also *The VIZCAYA* (E.D. Pa.), 63 F. Supp. 898, 1946 A.M.C. 469, where the Court held (p. 903):

> "The contention that the damage was occasioned by perils of the sea is, in my estimation, ill-founded. True, the weather at times was severe, but considering that the voyage involved crossing the North Atlantic in the winter season, it cannot be said that the weather encountered

was not to be anticipated. The weather was not 'catastrophic' or 'of such a nature' as to constitute a good exception in the statute or the bills of lading. The nature of the weather to be expected during February in the Atlantic is set forth in The Manual Arnus, D.C. S.D.N.Y., 10 F. Supp. 729, 1935 A.M.C. 786, which also determines that breakage of a deck rail is not decisive. Furthermore, that the worst weather encountered by the Vizcaya was expectable has already been judicially determined. Cf. *Ore. Steamship Corp. v. D/S A/S Hassell,* supra; *The CYPRIA* (R. Masso & Cia v. Cypria), D.C.S.D.N.Y. 46 F. Supp. 816, 1942 A.M.C. 985. As stated in *Weil, Inc. v. American West African Line (The WEST KEBAR)* 2 Cir., 147 F. 2d 363, at page 366, 1945 A.M.C. 191, at page 196, 'Even "whole gales"—are expected in such water at such a season'. See also, *The HOKKAI MARU,* D.C. S.D.N.Y. 17 F. Supp. 249, 1936 A.M.C. 1609; *The CITY OF KHIOS,* D.C.S.D.N.Y., 16 F. Supp. 923, 1936 A.M.C. 1291.

"The proper approach is indicated in *Societa Anonima, etc. v. Federal Ins. Co. (The ETTORE),* 2 Cir., 62 F. 2d 769, at page 771, 1933 A.M.C. 323, at page 326: 'Gales are likely at all seasons in the Atlantic, and this was at most not more. She should have been able to withstand it, else she was not reasonably fit for the duties she had undertaken, and was therefore not seaworthy. *The SILVIA,* 171 U.S. 462, 464, 19 S.Ct. 7, 43 L.Ed. 241; *The SOUTHWARK,* 191 U.S. 1, 8, 9, 24 S.Ct. 1, 48 L.Ed. 65'."

Summary of supporting evidence and authorities showing that the storm was not such as to constitute a "peril of the sea" within the Carriage of Goods by Sea Act.

The simple answer to Petitioner's arguments and its CONCLUSION REGARDING THE STORM (Pet. Br. 59, 60) is that as heretofore shown the evidence is clear that this storm in the North Pacific was not of such magnitude as to be unexpected. The evidence as hereinabove cited from Captain McMunagle of the STONETOWN (Weather Ship PAPA) (R. 1993), Captain Maeda of the KAMIKAWA MARU, the nearest ship or station to the PENNSYLVANIA (R. 535); Captain Mori of the KOTOH MARU, 182 (R. 1530) to 232 (R. 1506, 1533) miles from the PENNSYLVANIA all being that the storm was not unusual or unanticipated. That storms with wind force of "WNW 9" as described by the Master of the PENNSYLVANIA in his radiogram and even stronger weather are to be anticipated in a January passage of the Gulf of Alaska was even admitted by Mr. Vallet, Petitioner's Marine Superintendent (R. 190) and by Captain Dyer, the Petitioner's Marine Superintendent whose place Mr. Vallet took during the period of Voyages V and VI. Captain Dyer testified that "a Force 9 wind with heavy and confused seas is nothing unusual in the North Pacific in January, is it? A. No.", (R. 2582) which is supported by the testimony of Captain Harry Johnson (R. 2432) of expected winds from 6 to 10 and sometimes up to 12, and also to the same effect supported by testimony of Captain Frederick Ulstad (R. 2215-2216). Storms with winds of force 9 and 10, in which storm the

VESTRIS sank, were held not to constitute a "Peril of the Sea", with testimony of other vessels in the area being discounted with the remark by the Court; "Whether they are right in this or not, no other vessel—and some of them were small—suffered any serious damage" *The VESTRIS* (S.D.N.Y.) 60 F. 2d 273, 1932 A.M.C. 863. In *The ARAKAN* (D.C. Cal.), supra, 11 F. 2d 791, 1926 A.M.C. 191, and *The INDIEN,* supra, (D.C. Cal.) 5 F. Supp. 349, 1933 A.M.C. 1342, aff'd (9th Cir.) 71 F. 2d 752, 1934 A.M.C. 1050, it was held that storms even greater than that in which the PENNSYLVANIA sank are to be expected in the North Pacific in the winter months. See also *The TURRET CROWN,* supra, (2d Cir.) 297 Fed. 766, where Weather Bureau records were discounted and held of no evidentiary value as being too far distant from the vessel; *The GEORGIAN,* supra, 4 F. Supp. 178, 1933 A.M.C. 1540 aff'd by the Second Circuit in 76 F. 2d 550, 1935 A.M.C. 556; *The WEST KEBAR,* supra, (2d Cir.) 147 F. 2d 363; *The VIZCAYA,* supra, (E.D. Pa.) 63 F. Supp. 898; and *The EDWIN I. MORRISON,* 153 U.S. 199, 38 L. Ed. 688.

Petitioner may attempt to use the case of *Clarke et al. v. States S. S. Co.* (D.C. Cal.) 141 F. Supp. 706, 1956 A.M.C. 2056 with respect to the severity and extent of the storm. It will be noted that none of the cargo claimants were parties, that the decision was after the findings in this case, and that the characterization of the storm is directly in conflict with Judge Ling's decision.

From this testimony and the authorities supporting it, the District Court's finding that the storm in

which the PENNSYLVANIA sank was not a "Peril of the Sea", is not clearly erroneous.

II.

THE DISTRICT COURT'S FINDING THAT THE PENNSYLVANIA WAS UNSEAWORTHY AT THE INCEPTION OF HER VOYAGE AND THAT SUCH UNSEAWORTHINESS WAS THE PROXIMATE CAUSE OF HER SINKING IS SUPPORTED BY THE EVIDENCE AND NOT CLEARLY ERRONEOUS.

The Government, in its opening brief, fully discussed the privity and knowledge of the Petitioner concerning the unseaworthiness of the PENNSYLVANIA at the inception of her voyage with respect to:

(1) Crack sensitiveness to the expected cold temperatures and rough seas of the Gulf of Alaska on her Voyage VI in January 1952;

(2) The unseaworthy condition of the steering gears; and

(3) The violation of Title 46, Code of Federal Regulations, Sections 43.10-35, with respect to the security of the hatches and also the improper positioning of the deck cargo.[1]

Before discussing separately each of these factors of unseaworthiness culminating from the unseaworthiness of the PENNSYLVANIA at the inception of her voyage, which were found by the District Court

[1]Section 144.10-80 was not in effect in January 1952 and was inadvertently mis-cited in the Government's opening brief.

to have caused the sinking of the SS PENNSYLVANIA, attention is called to the fact that the PENNSYLVANIA sank in the Gulf of Alaska on January 9, 1952, four days after leaving her port of embarkation in weather to be expected which raises a presumption of unseaworthiness at the inception of the voyage, which has never been overcome by Petitioner. *Compagnie Maritime Francaise v. Meyer* (9th Cir., 1918), 248 Fed. 881; *The DEMOSTHENES* (4th Cir.), 189 F. 2d 488, 1951 A.M.C. 1833; *The T. J. HOOPER* (2d Cir.), 60 F. 2d 737, 1932 A.M.C. 1169, cert. denied 287 U.S. 662; *The SOUTHERN SWORD* (3rd Cir.), 190 F. 2d 394, 1951 A.M.C. 1518; *The IONIAN PIONEER* (5th Cir.), 236 F. 2d 78, 1956 A.M.C. 1750; see also *The OLANCHO* (S.D.N.Y.), 115 F. Supp. 107, 1953 A.M.C. 1040; *The CYPRIA* (S.D.N.Y.), 46 F. Supp. 816, 1942 A.M.C. 985, aff'd (2d Cir.), 137 F. 2d 326, 1943 A.M.C. 947. This presumption of unseaworthiness supports the finding of the District Court which finding is therefore not "clearly erroneous".

(1) The crack sensitiveness of the PENNSYLVANIA made the vessel unseaworthy for a voyage over the Great Circle in the cold temperatures and rough seas existing in the Gulf of Alaska during the month of January.

Finding V (R. 75-76) of the District Court, that the crack sensitiveness of the vessel to extreme cold weather was a factor of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage is supported by the evidence and not clearly erroneous.

The sensitivity of the steel plating of the PENNSYLVANIA is shown from the testing of the sample plate from the vessel where the 22-foot crack occurred, by Mr. Morgan L. Williams of the Bureau of Standards, who testified (R. 1868):

> " . . . Experience with ship plates and other tests conducted by other laboratories indicate that the 10-foot-pound transition temperature of the Charpy V-notched specimen is a pretty good indication of the temperature at which the steel is liable to be notch-sensitive.
>
> "Q. Would this plate here (referring to the sample plate from the PENNSYLVANIA) be sensitive in weather 30 to 40 degrees?
>
> A. It would." (Words in parenthesis added.)

The cold weather conditions of the Gulf of Alaska in January of any year can naturally be expected to be of low temperatures ranging from below freezing to forty or fifty degrees, and it is shown by Exhibit 91 that, at Ocean Station Peter (SS STONESTOWN) on January 9, 1952, the temperature was 32° F. From his twenty years of experience as a Chief Engineer and his knowledge of weather conditions in the North Pacific, the Petitioner's Marine Superintendent Vallet undoubtedly was aware and knew of these low temperatures in the Gulf of Alaska, the same being not only within his own experience but of common knowledge. In the Ship's Structure Committee's Report of 1946, which was known to Vallet and undoubtedly unknown to the master of the PENNSYLVANIA, it is shown that

the ESSO MANHATTAN (litigation concerning which was decided by the District Court, Southern District of New York, in 121 F. Supp. 770 at 774), split in two by reason of notch-sensitiveness in water temperatures of 38 degrees and air temperatures of 35 to 40 degrees. The fracture was of the brittle cleavage type showing that the ESSO MANHATTAN was notch-sensitive.

With respect to the warnings of the crack sensitiveness of the PENNSYLVANIA, it is first to be noted that Mr. Vallet testified (R. 263) that the 22-foot crack on Voyage V was the first instance that the vessel had cracked since the Petitioner took possession of her although it was brought to his attention that she had a number of minor cracks. It is to be noted further that the notation by Commander Rivard on February 13th of cracks on the main deck plate on the starboard side between Nos. 2 and 3 hatches, shows that they had appeared after the letter of February 7, 1951, from the Maritime Administration, which warned Petitioner against the conversion of the deep fuel tanks which cut off the equalizing trunks (R. 252), which included the cutting of hatch openings 16 feet long and 8 to 10 feet wide (R. 436), the Maritime Administration warning:

> "* * * Elimination of these trunks would definitely jeopardize the vessel * * *".

It is to be further noted that Mr. Vallet admitted (R. 275) that in some vessels:

> "they use methods of strengthening tank tops to strengthen the vessel against cracks".

The 22-foot crack was located just forward of the house near hatch No. 3 in the vicinity of the padeyes in which Commander Rivard found the previous cracks in February of 1951. The location of the 22-foot crack is described as being (R. 878):

> "On the starboard side, between frames 72 and 74, the deck plating cracked from a rivet on the afterside and forward side of the scupper, in the stringer plate, between Frames 73 and 74, running through deck plates A and B and ending approximately 11 inches into deck plate C. Crack is approximately 22 feet long."

The failure to repair cracks under padeyes (and it is to be noted that the 22-foot crack had its inception in an old unrepaired crack in a padeye) made the vessel unseaworthy according to Commander Rivard, who testified (R. 638):

> "Q. Where were these padeyes located in the fractures that were found?
>
> A. On this report dated January 30th under the pads—that is another report. In my report dated the 18th of February, yes, under the date of the 13th of February I make a note under that date, 'Additional work; main deck plate on starboard side between Nos. 2 and 3 hatches found fractured in way of two deck pads for heavy lift boom vang being removed' I went on to say there were two separate fractures, one on each side of the bulkhead.
>
> Q. One on each side of the bulkhead, you say?
>
> A. That is correct; they were separate fractures."

And he further testified as to these cracks (R. 647-648):

> "Q. In other words, from your answer to my question I think you have stated that where there is a crack in the plates there it was an essential repair job, and as I understand it the vessel was not seaworthy until such repairs were made to those cracks; is that correct?
>
> A. On the Main deck?
>
> Q. Yes, on your padeyes.
>
> A. Yes. When I use the expression in that case, it was a fracture that I had found, and it goes without saying that if in a case like that, if I find a fracture, it must be repaired before I can pass on it.
>
> Q. Well, the vessel is not seaworthy until it is repaired is it?
>
> A. That is correct.
>
> Q. Sure?
>
> A. That is correct."

There was also evidence that cracks were noted around padeyes near hatches 4 and 5 (R. 445). There was no close inspection made for cracks in the deck plating or any of the welds of the ship after the 22-foot crack, and the other small crack in its vicinity, had been repaired.

The testimony of Mr. Robert A. Hechtman shows that cracks in the vessel's deck plates (R. 2602) show evidence of extraordinary stresses on the vessel's deck and

> "that in a welded structure I would consider those cracks as something dangerous."

There has been no adequate explanation from the Petitioner as to why the PENNSYLVANIA started its cracking after the deep tanks were converted, when there was no evidence of any substantial cracking prior to that time.

This evidence, including the Report of the Ship's Structure Committee which referred to the sinking of the ESSO MANHATTAN by reason of its notch-sensitiveness to cold temperatures and rough seas, supports the Finding of the District Court herein (Finding V, R. 75):

> "That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo.";

and such Finding is not clearly erroneous.

(2) All methods of steering having failed four days after the vessel left port, there is a presumption of unseaworthiness. This presumption has not been overcome.

The graphic words of the radiograms from the PENNSYLVANIA "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL RE-

QUIRE ASSISTANCE" (Exhibits 127 and 128) on the 4th day after leaving Seattle, raise a strong presumption of unseaworthiness which the Petitioner has failed to overcome. See pages 41 to 51, Government's opening brief, *The A.H.F. SEEGER* (2d Cir.), 104 F. 2d 167, 1939 A.M.C. 792; *In re Reichert Towing Line* (2d Cir.), 251 F. 214 at 217; *IONIAN PIONEER* (5th Cir.), 236 F. 2d 78, 1956 A.M.C. 1750; *The MEANTICUT-BEDFORD* (S.D.N.Y.), 65 F. Supp. 203, 1946 A.M.C. 178.

It was, furthermore, ascertained from Petitioner's witnesses that although the emergency steering gear became clogged with cargo (clothing) and the emergency steering gear freed, there were no safeguards against reoccurrence provided (R. 372), although hold No. 5, where the clogging occurred on Voyage V, was, on Voyage VI, fully stowed with cargo. It is also shown by the record (R. 688-689) that the main and hand steering gears were not opened up, cleaned, or inspected. In the four year inspection, it was testified that the pumps are opened up and fully inspected (R. 687) but there was no evidence that the pumps in the steering gear were ever opened up by the petitioner. The last time that they were opened up was in 1949 (Exhibit 147).

Although counsel for Petitioner admitted at the trial (R. 658):

> "Mr. Wood. * * * I would like to state to your Honor that it is one of the contentions against us that in this case that the steering engine was not good",

the testimony of the former Chief Engineer Mathews (R. 351) only states that he made inspections of the steering gear from time to time and inspections on every watch were made by the man oiling the steering gear. The insufficiency of this type of inspection is held in *The VISCAYA* (D.C.E.D. Pa.), 63 F. Supp. 898, 1946 A.M.C. 469. What these inspections were, whether the steering gears in these inspections were ever opened up, whether the valves and pumps were ever cleaned so as to prevent stoppage by foreign matter, or as to leakage in the telemotor, was not shown. There was no evidence as to whether the hand steering and the emergency steering were tested regularly or periodically or at all. Evidence of this lack of operation and testing of the emergency steering gear may be taken from the fact that it became jammed on Voyage V and upon complaint of a member of the crew, it was repaired by releasing the cargo which had jammed the control. Mr. Mathews, the former chief engineer, attempts to explain the situation (R. 376):

> "A. If the telemotor system went out and the wheelhouse control was down and the weather was bad enough, it would be taking seas sometimes over that afterhouse I wouldn't want to be steering up there myself. It is only a connection to the steering room anyway.
>
> Q. Just below you?
>
> A. And down below in the steering room you have a repeater compass down there and two trick wheels you can steer from. And if all your power is gone you have a hand wheel you can steer from."

The radiograms state "CANNOT STEER * * * IF WE CANNOT FIX STEERING GEAR WILL NEED ASSISTANCE". This means that all of these methods of steering failed. The presumption is therefore certain that proper testing, operation, cleaning and repairs of these multiple systems of steering were not made before the inception of the voyage and that the steering gears were in fact unseaworthy at the inception of her voyage. If the tests, inspections and repairs had been made it was the duty of Petitioner to come forward and show them; but although placed on notice of the contentions that the steering engines were not good, it failed to supply the proof, if it had any, of the proper inspections and trial operations.

The opinion in *The FRIESLAND* (S.D.N.Y. 1900) 104 Fed. 99 is applicable to this situation, where in that case the Court says:

> ". . . The evidence taken by commission as respects the kind of inspection made is brief and unsatisfactory. It does not appear that the chest was ever taken out for examination from the time it was put in some nine years previous to this damage, or that the valve itself, was taken out for the purpose of seeing better how great was the wear at the bottom."

The Court, itself, can realize the effect of the failure of the steering gear in the storm, and that the real complaint of the master was the inability to steer and not the weather. In *The TURRET CROWN* (2d Cir.), 297 Fed. 766, the Court says:

> "It is significant that the first mention of seas coming aboard the vessel follows after entry of trouble with the steering gear in the log";

and in *The TENEDOS* (S.D.N.Y.), 137 Fed. 443 aff'd (2d Cir.) 151 Fed. 1022, the Court said:

> "Evidence was given for the Tenedos by three experienced captains, which is claimed to show that there was as much examination of the ports made in this case as on other vessels. *But the fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them.* The Edwin I. Morrison, 153 U.S. 217, 38 L. Ed. 688." (Italics supplied.);

and in *The CYPRIA* (S.D.N.Y.), 46 F. Supp. 816, 1942 A.M.C. 985, aff'd (2d Cir.), 137 F. 2d 326, 1943 A.M.C. 947, the Court says:

> ". . . The fact that this rivet had caused no trouble up to this time does not indicate that it was sound, but merely that its weakness had not been discovered. The Cypria was not reasonably fit to carry the cargo which she had undertaken to transport and therefore was not seaworthy. The Silvia, 171 U. S. 462, 43 L. Ed. 241."

From the radiograms, it can be easily pictured that the vessel, having lost steerageway, being unable to steer, was wallowing in the trough of the sea, the crest of the waves pounding down on the deck taking the insecure hatch coverings and tarpaulins off the hatches, and filling the cargo holds, stowed with grain, full of water which could not be pumped out, and

finally resulting in the vessel going down bow first, with a total loss of vessel, crew and cargo. With this picture in mind, it is apparent that this finding of unseaworthiness was not clearly erroneous.

(3) The PENNSYLVANIA was unseaworthy by reason of her violation of the hatch security regulations, 46 Code of Federal Regulations, Section 43.10-35, and unseaworthy positioning of her deck cargo.

The District Court in Finding V, in referring to the "faults, failures, breakdowns and defects" set forth in the preceding Finding IV, of course included the contributory factors responsible for the sinking of the SS PENNSYLVANIA,

> "that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches and that the No. 2 hatch was open and full of water."

The unseaworthiness of the PENNSYLVANIA with respect to the securing of her hatches and the improper positioning of cargo on the forward decks, with citation of authorities, is discussed in the Government's opening brief in pages 51 to 59, inclusive.

By inadvertence, the Government, in its opening brief referred to and quoted from Title 46, Code of Federal Regulations, Sec. 144.10-80, which was not in effect at the time of the PENNSYLVANIA'S sinking. The appropriate regulation, upon which the Government relies, is the more specific regulation at Title 46, C.F.R. Sec. 43.10-35 which reads:

> "*Battens and Wedges.* Battens and wedges are to be efficient and in good condition."

In the Government's opening brief, the testimony showing the defective condition of the battens in the forward hatches was pointed out and reviewed. Under the authority of the decision of this Court in *The DENALI,* 105 F. 2d 413, 1939 A.M.C. 930, the evidence in this case requires the application of the Pennsylvania Rule (*The PENNSYLVANIA,* 19 Wall. 125, 22 L. ed. 148), which holds that where there is a violation of a statute:

> ". . . The rule simply is that the violator is penalized with the *burden of showing that the violation not only probably did not cause the accident, but that it could not have done so.*" . . . (Italics supplied.)

This Rule has been repeatedly followed in this Circuit. *The PRINCESS SOPHIA,* (9th Cir.) 61 F. 2d 339, 347; *The CHICAGO SILVERPALM,* (9th Cir.), 94 F. 2d 754. With the uncontroverted testimony of three members of the PENNSYLVANIA's crew for Voyage V establishing that the cross-battens on the forward hatches, including Hatch No. 2 which filled with water, were bent and buckled (R. 2081, 2094, 2095, 2100 and 2101), it is submitted that the Petitioner did not show that this violation of the regulations "not only probably did not cause the accident, but that it could not have done so". The improper positioning of the heavy trailers on the forward decks, lashed by chains to the padeyes, and the stowage of the acid cargo by No. 2 hatch, which, as stated in the radiograms, had its covers torn off by the drifting cargo, and filled with water, also support the finding

of the District Court. It is apparent that this finding of unseaworthiness is not clearly erroneous.

PETITIONER'S EXPERTS ON SEAWORTHINESS.

In answer to Petitioner's contention on pages 72 and 73 of its brief, that the PENNSYLVANIA was seaworthy at the inception of her voyage, first, because of the testimony of the many expert men who examined her and whose responsibility it was, the Government has cited many cases in its former brief holding that diligence in obtaining certificates of seaworthiness is not the test of due diligence. *The VESTRIS* (S.D.N.Y.) 60 F. 2d 273, 1932 A.M.C. 863; The *EDGAR F. CONEY AND TOW* (5th Cir.), 72 F. 2d 490, 1934 A.M.C. 1122, 1127; *COMPAGNIE MARITIME FRANCAISE v. MEYER* (9th Cir.) 248 F. 881; *BANK LINE v. PORTER* (4th Cir.) 25 F. 2d 843, 1928 A.M.C. 761; *The FELTRE* (9th Cir.) 30 F. 2d 62, 1929 A.M.C. 279; *The NINFA* (D.C. ORE. 1907) 156 Fed. 512.

The examination by E. D. Tucker, Roy E. Knowles and F. P. Miller at the condition survey, was at a time before the cracks were discovered by Commander Rivard around No. 2 and No. 3 hatches in the padeyes. Surveyor Miller, who attended at the annual inspection in August, 1951, did not examine or inspect the internal parts of the steering gear, simply stating that he (R. 411) "examined the steering arrangements, which consisted of the telemotor, hydraulic pumps,

drive motors emergency gear," but did not testify that they were opened up or as to their internal condition or what his examination consisted of, made no inspection under the padeyes for cracks and no inspection of the battens and turnbuckles on the hatches. The fourth named expert Commander Rivard, testified that he found cracks in the deck in February, 1951, in the padeyes near hatches No. 2 and No. 3 (R. 638), and that until such cracks were repaired, the vessel was unseaworthy (R. 648). John D. Gilmore, testified that the vessel was unseaworthy for Voyage VI with the acid cargo positioned on deck near the No. 2 hatch (R. 2301). Lieutenant Rojeski testified only to a manual test of the steering gear and made no tests or examination of the padeyes for cracks. Commander Hamilton, of the Coast Guard, described the inadequate manual tests which they made of the steering gear and stated that the internal parts of the steering gear and her pumps were not opened up (R. 689). This shows that the internal parts of the steering gear, with its valves and pumps, were not cleaned of foreign matter. Furthermore, Commander Hamilton made no examination of the deck for cracks under the padeyes.

Harold R. Pratt, of the American Bureau of Shipping, examined the 22-foot crack at Portland with Vallet and the repairs after they were made. He only examined the two padeyes, the one in which the 22-foot crack occurred on the starboard side, and the one on the port deck the padeye of which was removed and an insert placed in the deck. He saw the crack in the padeye on the port side which was visible (R. 906),

his inspection being only in November 1951. Captain Endresen made an examination of the 22-foot crack in November, 1951, and made his report on the fracture with a little diagram (Exhibit 65). He made no other examinations. Captain Bennett examined the 22-foot crack before and after it was repaired (R. 1130) and he only examined the area of the 22-foot crack in November, 1951. Kenneth Webb, a surveyor for the Board of Marine Underwriters, surveyed the damage and repairs to the 22-foot crack (R. 1122), never having seen the vessel prior to that time (R. 1124) described the 22-foot crack as a Class I casualty (R. 1125), did not examine any other parts of the vessel for damage (R. 1127), and did not inspect the holds because they were loaded with cargo (R. 1128). Mr. K. C. Sloan, of the Albina Engine and Machine Works, had only to do with the repair of the 22-foot crack and the removal of the padeye and the crack thereunder on the port side of the deck making no examination of the other padeyes and his testimony only concerned the making of repairs according to specifications (R. 865). The testimony of J. D. Wilson, surveyor for the American Bureau of Shipping, was that he examined the vessel on drydock on December 22, 1951, and made his survey report of such drydock examination (Exhibit 57). Mr. Wilson did not testify concerning the steering gear or any inspection of the *innards* thereof, the valves or pumps, and there is no evidence that the steering gear was opened up and examined. There was no testimony that Mr. Wilson had been advised fully of the 22-foot crack on the

starboard side of the deck and the small crack on the port side, both under padeyes, nor that he inspected any of the padeyes on the vessel's deck. Mr. James F. Goodrich was the Assistant General Manager of Todd's, and only examined the hull of the ship, making his examinations in January and December 21st, 22nd, of 1951. His testimony mainly concerned the question of there being a hog in the bottom of the vessel. He stated (R. 2823), that he did not make examinations to determine seaworthiness, and that (R. 2824), he did not recall that they had an order on the steering engine.

It is therefore apparent that no inspections were made of any of the padeyes after the 22-foot fracture other than that particular padeye on the starboard side and the padeye on the port side near hatch No. 3 on completion of Voyage V. The testimony of the experts shows that they, and the Petitioner's officers, and in fact no one, made an examination of any of the padeyes, other than the two near hatch No. 3 which were repaired in November, 1951, although Commander Rivard had stated that any fractures under the padeyes which were not repaired made the vessel unseaworthy.

With respect to the contention of Petitioner that her navigation of the seas for eight years, the last five on this very trans-Pacific route where she was wrecked, evidenced her seaworthiness, the simple answer is the fact that she did not survive Voyage VI in weather to be expected, and that as stated by the Second Circuit in *The TURRET CROWN* (2d Cir.),

297 Fed. 766, "The real difficulty with the sea was in the inability to have the vessel under control, owing to her defective steering gear."

With respect to many of the officers and some of the crew remaining on the ship, this does not evidence seaworthiness. The Chief Engineer did not remain on the ship and several others failed to rejoin. The further proposition that the vessel survived through Pennsylvania Storm No. 1 and Storm No. 2, is no test of her seaworthiness, as all of the other sixteen vessels, some of which were much smaller, as stated in *The VESTRIS* (S.D.N.Y.) 60 F.2d 273, 1932 A.M.C. 863, survived with little or no damage. The vessel was simply crack sensitive to the cold weather of the Gulf of Alaska. She suffered the crack which was to be anticipated from her crack sensitiveness. Her steering gear was faulty, allowing her to be thrown in the trough of the sea and at the mercy of the storm, the insufficient hatch coverings failing to hold the hatch covers on when the improperly positioned deck cargo came adrift and tore them off.

SUMMARY OF EVIDENCE AND AUTHORITIES SUPPORTING DISTRICT COURT'S FINDING THAT THE PENNSYLVANIA WAS UNSEAWORTHY AT THE INCEPTION OF HER VOYAGE.

Summarizing the Government's position that the evidence and the authorities fully support the District Court's finding that the PENNSYLVANIA was unseaworthy at the inception of her voyage, and that such unseaworthiness was the proximate cause of her

sinking, it is, first of all, to be noted that four days after leaving the port of Seattle, the PENNSYLVANIA sank. The causes of her sinking are admitted by the Petitioner to be set forth in the radiograms from the vessel. The radiograms state three distinct causes for the PENNSYLVANIA's loss:

First, 14-foot crack down into the engine room between frames 92 and 94;

Second, "Unable to steer. If we cannot fix steering gear will require assistance";

Third, "Deck load adrift taking tarpaulins off hatches and that hatch was open and No. 2 hatch full of water."

The District Court in Finding IV held that these were contributing factors responsible for the sinking of the PENNSYLVANIA, and in Finding V, that these faults, failures, breakdowns and defects were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions, and proximately caused her sinking.

With respect to Finding IV, the Petitioner on page 63 of its brief, admits:

> " . . . That they were 'contributory factors responsible for the sinking of the SS PENNSYLVANIA'; as stated in Finding IV, can hardly be denied. That they were 'factors of unseaworthiness' at the time of her sinking is, in a sense, true too."

Petitioner, however, raises a question as to whether these factors were the result of her condition when the PENNSYLVANIA left the dock in Seattle. The previous cracks in the padeyes near No. 2, No. 3, No. 4 and No. 5 hatches culminated in the 22-foot crack in the padeye near No. 3 hatch forward of the house. This was an old crack which had not been repaired. All of these cracks were discovered after the deep fuel tanks were converted for the carriage therein of dry cargo. Not only were large hatches cut in the deep tanks but the equalizing trunks were eliminated against the warning of the Maritime Administration. It was emphasized by all of the experts that cracks were caused by stresses. It was also admitted by Mr. Vallet that strengthening of tank tops was made in some vessels to prevent cracks in the deck.

The report of the sinking of the ESSO MANHATTAN, in the Report of the Ship's Structure Committee in 1946, was a warning of the crack sensitiveness of the PENNSYLVANIA so as to prevent her use in the cold temperatures and rough seas of the North Pacific.

With respect to the failure of the steering gear, the unseaworthiness of the vessel in that regard can be simply summarized by the fact, as stated in many authorities, that the failure of this vital machinery four days after the vessel left port raises a presumption of unseaworthiness. The failure to use any proper tests, opening up of the steering gears, cleaning the steering gears, or even showing periodical manual op-

eration of the hand steering and emergency steering gear, raises a presumption that the steering gears were not in proper condition at the inception of the voyage. This was evidenced by the failure of the emergency steering gear on completion of Voyage V brought to the attention of the Coast Guard by a member of the crew.

The deck cargo coming adrift, taking off the tarpaulins and hatch covers, in view of the previous experience of damage caused by deck cargo, showing the improper positioning of the deck cargo, together with the failure to show compliance with the Hatch Security Regulations, support the finding of unseaworthiness in that regard.

It is submitted that the finding of the District Court of the unseaworthiness of the PENNSYLVANIA at the inception of her voyage is supported by the evidence and not clearly erroneous.

III.

THE DISTRICT COURT'S FINDING THAT THE PETITIONER FAILED TO USE DUE DILIGENCE TO MAKE THE PENNSYLVANIA SEAWORTHY AT THE INCEPTION OF HER VOYAGE IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

The discussion in the Government's opening brief of the privity and knowledge of the Petitioner, through its Marine Superintendent Vallet, of the many faults, failures, breakdowns, defects and crack sensitiveness found by the Court as "factors of unsea-

worthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage" supports the finding of the District Court that the Petitioner did not use the due diligence required by law to make the vessel seaworthy at the inception of her voyage.

The Petitioner, by the exercise of due diligence could have ascertained, if in fact it did not actually know through its Marine Superintendent, that the PENNSYLVANIA was crack sensitive to the cold temperatures and rough seas of the Gulf of Alaska in January of 1952, that the steering gears were faulty, needing cleaning and repair, that the deck load was improperly positioned, and that, by reason thereof, she was not seaworthy to successfully meet the cold temperatures and storms expected and actually met on her Voyage VI. The Petitioner is therefore placed on the horns of a dilemma. On the first horn of the dilemma, if Petitioner failed to exercise due diligence to ascertain the seaworthiness of the PENNSYLVANIA at the inception of her voyage, Petitioner would be liable under the Carriage of Goods by Sea Act, which requires the exercise of such due diligence. On the other horn of the dilemma, it is apparent that if Petitioner had proved that it had used due diligence to ascertain the actual condition of the PENNSYLVANIA with respect to her crack sensitivity, her faulty steering gears, her broken and bent battens, and the improper positioning of her deck cargo, then Petitioner must have found that the PENNSYLVANIA was not fit to meet the conditions

to be expected on her voyage and, in sailing the vessel in such a known unseaworthy condition, it could not escape liability.

All of the Petitioner's experts and its own employees admitted that even after the finding of the cracks in padeyes in the vicinity of hatches 3 and 4 by Commander Rivard, who stated that until repaired the ship was unseaworthy, there was no inspection of other padeyes. This undoubtedly resulted in the 22 foot crack, which had its inception from an old crack in the padeye according to Mr. Williams of the Bureau of Standards (R. 1859). And even with this warning and knowledge no inspections were made of any of the butt welds or of any of the other padeyes prior to sailing the PENNSYLVANIA on her Voyage VI. And with this history of cracks, together with the Ship Structure Committee's report of 1946 before Mr. Vallet, showing what happened to the ESSO MANHATTAN and the apparent notch sensitivity of the SS PENNSYLVANIA to low temperatures, she was sailed on the Great Circle Route where she met what could really be called her "predetermined fate." It needs no authority or further evidence to show that Petitioner has not used due diligence to determine seaworthiness, as it already knew that the PENNSYLVANIA was not able to meet the expected and to be anticipated low temperatures and heavy seas of the Gulf of Alaska.

The steering gears having failed four days after the departure of the vessel from Seattle, the vessel was thereby presumptively unseaworthy at the incep-

on of her voyage. In attempting to show due diligence in making the vessel seaworthy, the Petitioner's witnesses actually disclosed that there was only visual inspection of the steering engines and an operating test with no inspection of the interior workings of the steering gear or of its valves or pumps.

The opinion of Judge Learned Hand in *W. R. Grace & Co. v. Panama R. Co.* (S.D.N.Y.) 285 Fed. 718 aff'd (2d Cir.) 285 Fed. 718, is in this instance very applicable. In speaking of leaks around the sea valves which were covered by boxes where inspection did not include the taking off of the boxes and examining the valves before the voyage was commenced, Judge Learned Hand there states:

> "In such cases the ship has the laboring oar, and must show that she could not reasonably have avoided the loss, and I think she has failed. I cannot think that under the circumstances it was sufficient precaution merely to look below the boxes and note that no leaks had as yet developed substantial enough to leave signs after the water had presumably dried. Had the whole fixtures been in apparently good condition, they could hardly have become so dilapidated in a single voyage, with no heavier weather than that encountered. * * * It does not seem to me, however, that after the space of six months [after dry dock] it was safe to ignore such fixtures, boxed in as they were, and constantly subject to the twists and strains due to the movements of the parts of a ship with relation to each other."

In *The CYPRIA* (S.D.N.Y.) 46 F. Supp. 816, at 819, 1942 A.M.C. 985, aff'd (2d Cir.) 137 F. 2d 326, 1943

A.M.C. 947, in holding that due diligence had not been proven with respect to the examination of the vessel's plates the Court said:

> "The fact that this rivet had caused no trouble up to this time does not indicate that it was sound, but merely that its weakness had not been discovered.
>
> * * * * * * *
>
> A visual examination of the crack described would not be likely to disclose the condition of each rivet. No hammer or other specific test was made of the rivets, nor is there proof that any such tests had been made during the entire period between the time she was built and the voyage in question."

The visual inspection of the steering gear and the failure to open up the steering gear, its valves and pumps (R. 687-689) are not sufficient to comply with the duty of due diligence as stated in *The CYPRIA,* supra, for such visual inspection is not:

> ". . . of such character as to make reasonably sure that they are in condition to transport the cargo without damage, except from inevitable dangers. The shipper is entitled to this. If the vessel owner fails in this duty it and not the cargo owner assumes the risk of damage."

The presumption of unseaworthiness of the steering engines, arising when the three systems all failed, four days after leaving port, is emphasized by the decision in the Second Circuit, in the case of *The A.H.F. SEEGER,* 104 F. 2d 167, 1939 A.M.C. 792 (cited at page 45 of Government's opening brief).

There the Second Circuit emphasizes, at page 168:

> "* * * it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. * * *"

Also, in *The IONIAN PIONEER,* 236 F. 2d 78, 80, 1956 A.M.C. 1750, the Fifth Circuit emphasized the situation in the instant case where the Court notes that there is:

> "* * * a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. Southwark, 191 U.S. 1, Olancho (S.D.N.Y.), 1953 A.M.C. 1040, 115 F. Supp. 107; Agwimoon (D.C. Md.), 1928 A.M.C. 645, 24 F. (2d) 864 aff'r. (4 Cir.), 1929 A.M.C. 570, 31 F. (2d) 1006.
>
> * * * * * * *
>
> ". . . Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of seaworthiness from Helenic or Lloyds classification societies and which is certainly not the test, see KNAUTH, supra, page 187; ABBAZIA (S.D. N.Y.), 127 Fed. 495; Poleric (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; Edgar F. Coney, (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, *the record*

is completely silent of any serious inspection an survey of the entire steering machinery befor this charter party voyage began." (Italics sup plied.)

The failure to fully inspect the steering gear an make visual tests and physical tests was like the cas of *The MEANTICUT-BEDFORD,* 65 F. Supp. 20 1946 A.M.C. 178, where the Court commented:

". . . repeatedly turning the wheel and watchin the indicator were not sufficient."

Petitioner's own cases demonstrate a much highe standard in proving due diligence than Petitioner ha here shown. In *The ZAREMBO* (E.D.N.Y.) 44 F Supp. 915, 919, aff'd 136 F. (2d) 320, cert. den. 32 U.S. 804, cited at page 134 Petitioner's Brief, the ship owner shows four specific examinations of the exac plate in the No. 1 Hold which had cracked as well a an examination of both the interior and exterior o that No. 1 Hold immediately prior to the time of th vessel's sailing. In the present case the Petitione has shown no such specific examinations of the are of Voyage VI plate damage.

Further illustration by comparison of Petitioner' lack of due diligence as regards inspections of th steering gears is contained in *The FLORIDIAN* (2 Cir.) 83 F. (2d) 949, 1936 A.M.C. 1006 cited by th Petitioner at page 134. In that case the steering gea was taken apart for close examination.

Petitioner took the testimony of Charles E Matthews, the Chief Engineer on Voyage V who tes

fied (R. 350-351) that he was responsible for the roper functioning of the steering apparatus of the ıip, that he made inspections from time to time of ıe steering gear and that the Oiler also made inpections. That this evidence is insufficient to show ıe exercise of due diligence is directly held in the ıse of *The VIZCAYA* (D.C. E. D. Pa.) 63 F. Supp. 98, 904, 1946 A.M.C. 469, 497, where the Court says:

> "* * * As to the exercise of due diligence, the only evidence is that the chief engineer 'inspected' the machinery and found everything fit. But this is insufficient, for I feel that information as to the care and extent of the inspection is of vital importance. Thus, it has been held that a visual inspection is 'inadequate'. * * *
>
> In any event, if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner."

In *The RIDEOUT* No. 7 (California & Hawaiian ;ugar Ref. Corp. v. Rideout) (9th Cir.), 53 F. 2d 22, 325, 1931 A.M.C. 1870, Circuit Judge Sawtelle, endering the opinion of this Court says:

> ". . . In The FELTRE (C.C.A. 9), 1929 A.M.C. 279, 283, 30 F. (2d) 62, 64, Judge Gilbert used the following language:
>
> 'To render available an exemption in a contract of carriage from absolute warranty of seaworthiness, the burden of proving the exercise of due diligence rests upon the shipowner. The WILDCROFT, 201 U.S. 378, and it is not sufficient that the shipowner employ competent men to make the inspection. He is held accountable for the failure of the man he employs to discover patent

defects, Int. Nav. Co. v. Farr & Bailey Mfg. Co 181 U.S. 218; The MANITOBA (D.C.), 104 F 145, 151; The PHOENICIA (D.C.), 90 Fed. 116 Said Mr. Justice Holmes in The GERMANIC, 19 U.S. 589, 596: "But it is a mistake to say, a petitioner does, that if the man on the spot, eve an expert, does what his judgment approves, h cannot be found negligent. The standard of con duct * * * is an external standard, and takes n account of the personal equation of the man con cerned." In The ABBAZIA (D.C.), 127 Fed. 495 496, Judge Adams said that the diligence require "is diligence with respect to the vessel, not in ob taining certificates." ' "

On the issue of due diligence petitioner states (Pet Brief 133): "it is difficult to imagine what more a shipowner could do." Without belaboring the point it might be pointed out that petitioner, as a ship owner, could and should have done all of the follow ing:

(1) Petitioner should have thoroughly in spected the vessel, in a completely unloaded con dition, after the Class I casualty of Voyage V Even petitioner's Marine Superintendent testified that a vessel should be completely unloaded for a thorough inspection. This thorough inspectio should have included a minute examination of al padeyes and butt welds for small cracks becaus of the previous cracking of the PENNSYL VANIA on Voyage V, originating in a smal padeye crack, and the reported cracking of th ESSO MANHATTAN, originating in a butt weld. Such a thorough examination may wel have disclosed the incipient crack in the butt weld

between frames 93 and 94 which extended to 14 feet during heavy weather on Voyage VI.

(2) Petitioner should have taken affirmative steps to make certain that the steering systems of the PENNSYLVANIA were in fit condition for the weather to be expected by opening them up to check for wear and lack of cleanliness, cleaning and replacing worn parts. Further, the petitioner could and should have taken proper precautions to insure that the jamming of the emergency steering gear by cargo, which occurred on Voyage V, could not reoccur.

(3) Petitioner should have carefully examined the condition of the locking bars, eliminating the bent hatch securing devices on the forward hatches, (which were discovered on Voyage V) in order to insure the security of the forward hatches.

(4) Petitioner should have properly positioned the acid cargo in a more sheltered position than the exposed forward deck area.

s stated in *The REPUBLIC* (S.D.N.Y.) 57 Fed. 40 aff'd (2d Cir.) (1894) 61 Fed. 109:

"The petitioners cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put."

With the evidence and the authorities thus supporting the District Court's Finding VI "that the petitioner did not use the due diligence required by law

to make the vessel seaworthy and to entitle it to ex oneration from liability" it is apparent that thi finding is not clearly erroneous.

CONCLUSION.

No matter how many pages of briefs may be writ ten, no matter how many authorities may be cited, n matter how many experts may have testified, the clea plain and inescapable language of the master an members of the crew of the PENNSYLVANIA tha came through by radio, point the finger against Pe titioner of negligence, privity and knowledge of th very causes which were responsible for the loss o the PENNSYLVANIA. The Petitioner cannot es cape full liability here as it did in *The IOWA* (D.C Oregon), 34 F. Supp. 843, 1938 A.M.C. 615. The miss ing link in that case is supplied here by the master' description, in his radio messages, of the faults, fail ures, breakdowns and defects of the vessel which wer causing the vessel to have her forward holds fill wit water and sink bow first. These messages fully tel the story, as found by the District Court in its find ings, that there was no peril of the sea, and that th cause of the sinking of the PENNSYLVANIA wa her own unseaworthiness at the inception of her voy age.

There cannot be any other explanation for the sink ing of the PENNSYLVANIA which, four days afte her departure from Seattle, cracked in a main but weld, had all steering methods fail, had her dec

rgo come adrift and breached forward hatches, took ıter in No. 1 and No. 2 holds, went down by the ·ad and sank in weather survived by sixteen other ·ssels without any substantial damage.

The contributory factors responsible for the sink-g, as found by the District Court, are admitted by e Petitioner in its brief as being factors which may ıve been responsible for the immediate sinking of the S PENNSYLVANIA, but Petitioner contends that ey did not culminate from the condition of the ·ssel at the inception of her voyage.

The evidence and the authorities cited by the Gov-nment support Findings I, II, III, IV, V and VI the Court, including the finding of the Court that the Petitioner did not use the due diligence required y law to make the vessel seaworthy and to entitle to exoneration from liability."

It must be apparent to the Court that there can be ɔ explanation other than the unseaworthiness of the ENNSYLVANIA prior to leaving the port of eattle which can explain or account for the many ıults, failures, breakdowns and defects set forth in ıe District Court's Finding IV.

All of these conditions were under the jurisdiction f Mr. Vallet, the alter ego of Petitioner, who was ɜsponsible for the manning, operations, and repairs f the PENNSYLVANIA, the duty of proper in-ɔection and repair being delegated to him. The of-cers of the corporation according to the testimony f Mr. J. R. Dant (R. 2624) did not take part in that

branch of the corporation's business, which covere the operation of its vessels. The act or failure to ac the knowledge, either actual or constructive, was als Mr. Vallet's.

Petitioner has suggested to the Court adheren to the warnings of Mr. Justice Holmes against to easy a finding of privity in a limitation case, but th Government suggests that the words of Circuit Judg Sawtelle of the Ninth Circuit are more applicab herein, especially where In *RIDEOUT* No. 7, 53 F 2d 322, at 326, he says:

> "From ancient times the men who have had t go down to the sea in ships have held themselve to high accountability for care in making the craft fit to cope with the capricious element Though, as we have seen, the shipowner's liabilit has been limited by statute, such limitation in h favor is to be strictly construed against him, i he fails to prove his own diligence in making th vessel seaworthy.
>
> The good sailor is the careful sailor. If he negligent in the respects set forth in the Harte Act in guarding the goods and the lives entruste to his care, he, or his employer must pay. It the law of the sea."

The failure of the Petitioner to properly guard "th goods and lives entrusted to its care" resulted in on of the greatest tragedies of the North Pacific in whic 45 men lost their lives and the goods of the claiman were destroyed. The storms were not the greatest i years, but as shown by the testimony (see also *Th*

RAKAN, supra, and *The INDIEN,* supra), were e regular winter storms to be expected. This great agedy occurred by reason of the Petitioner taking a alculated risk" in sending *The PENNSYLVANIA,* r which the Petitioner had paid only 25% of its purase price, to what might be called its "foreseeable te" after its No. 1 casualty, in the cold temperatures d rough seas of the North Pacific. For this neglience with privity, in the words of Circuit Judge Sawlle, Petitioner "must pay. It is the law of the sea."

It is respectfully submitted that the District Court's ding denying exoneration should be affirmed and the ding granting limitation should be reversed.

Dated, February 19, 1957.

Respectfully submitted,

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No. 15131

In the

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant,*

v.

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UNITED STATES OF AMERICA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

THE DOMINION OF CANADA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees.*

ANSWERING BRIEF OF APPELLEES

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

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JURISDICTION

This proceeding was commenced by the filing of a petition for exoneration from or limitation of liability by States Steamship Company as corporate owner of the SS PENNSYLVANIA. The petition was filed in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was acquired under Rules 51-55 of the United States Supreme Court Admiralty Rules.

The jurisdiction of the this court was acquired under 62 Stat. 929, 28 U.S.C.A. § 1292.

INTRODUCTION

The opening brief filed by appellants, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, relates solely to the subject of limitation of liability and the clear error of the trial court in failing to find that the unseaworthy condition of the SS PENNSYLVANIA at the inception of her fatal voyage was within the privity or knowledge of States Steamship Company, within the

meaning of the Limitation of Liability Act, 46 USCA § 183.

In this answering brief, appellees, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, will show that the record in this proceeding contains satisfactory and substantial evidence supporting the findings and conclusions of the trial court to the effect that the storm in which the SS PENNSYLVANIA was lost was not of such magnitude as to constitute a peril of the sea; the proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness; the failure and difficulties outlined in the vessel's radio messages were factors of unseaworthiness and the contributory factors proximately causing the sinking; the vessel was unseaworthy by reason of these factors at the inception of her voyage, and petitioner failed to exercise due diligence to make the vessel seaworthy.

To simplify identification, States Steamship Company shall hereinafter be referred to as "petitioner".

ANSWER TO PETITIONER STATES STEAMSHIP COMPANY'S CONCISE STATEMENT OF THE CASE

At pages 3 and 4 of its opening brief, petitioner refers to a written memorandum opinion of the trial

court, dated November 17, 1955. This opinion is also referred to in subsequent portions of the petitioner's brief and is set forth in the appendix to petitioner's brief.

In making reference to the above opinion, petitioner completely ignores the fact that the trial court, in hearing argument upon settlement of the findings of fact and conclusions of law, refused to adhere to his written memorandum opinion and after full argument of all counsel entered his findings of fact and conclusions of law (Tr 72).

In its effort to derive comfort from the memorandum opinion, petitioner ignores the recent ruling of this court in *KISKA-MAYFLOWER*, 205 F2d 262 (9th Cir., 1953), 1953 AMC 1021, to the effect that on appeal from the interlocutory decree of the District Court in an admiralty suit, the Court of Appeals must consider the formal findings of fact and conclusions of law entered in the District Court by the trial judge as distinguished from the trial judge's statements in his opinion. The rule was stated by this court as follows:

> "The formal findings of fact and conclusions of law made by the trial judge and entered in the District Court is the requisite instrument for consideration of this appeal in this court."

Any reference throughout appellant's brief to the memorandum opinion of the trial judge should, accordingly, be completely disregarded.

At page 4 of its brief, petitioner, while attempting to review the findings of fact entered by the trial court, asserts that while such findings hold that the vessel was unseaworthy at the inception of her voyage, they do not state what that unseaworthiness was. This contention is amplified in subsequent portions of petitioner's brief, particularly at pages 61 through 64 of petitioner's argument that the vessel was seaworthy. A review of the findings of the trial court will readily disclose that these findings clearly specify the nature of the unseaworthiness of the SS PENNSYLVANIA at the inception of her voyage, as we shall develop subsequently in argument.

Petitioner includes as a question involved in this appeal an issue as to the existence of latent defects in the SS PENNSYLVANIA not discoverable by due diligence. This contention was not raised in the petition for exoneration from or limitation of liability and is now raised by petitioner for the first time in this proceeding. In argument, we shall show that the so-called "latent defect" doctrine is not an issue in this appeal and certainly is not available as a defense to liability in this proceeding.

QUESTIONS PRESENTED

Does the evidence of record in this proceeding provide reasonable support for Findings of Fact Nos. III, IV, V and VI and Conclusion of Law No. II made by the trial judge and entered in the District Court? For convenient reference, the foregoing findings and conclusion are set forth in full context, as follows (Tr 72):

Finding of Fact No. III

> "The storm, which had been designated as the PENNSYLVANIA storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness."

Finding of Fact No. IV

> "The contributory factors responsible for the sinking of the SS PENNSYLVANIA are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steer-

ing systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water."

Finding of Fact No. V

"That the foregoing faults, failures, breakdowns and defects set forth in the preceeding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo."

Finding of Fact No. VI

"That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability."

Conclusions of Law No. II

"That the petitioner has failed to prove due diligence to make the SS PENNSYLVANIA seaworthy at the inception of the voyage upon which she sank by reason of her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants."

SUMMARY OF ARGUMENT

I

The finding of the trial court that the storm encountered by the SS PENNSYLVANIA did not constitute a peril of the sea and was not the proximate cause of the sinking of the vessel is amply supported by the evidence and should not be disturbed on this appeal.

A. Evidence that the Storm Was Not a Peril of the Sea.

B. Exceptions to Argument of Petitioner on Evidence Relating to the PENNSYLVANIA Storm.

C. Law as to the Peril of the Sea and Statutory Exceptions to Liability under the Carriage of Goods by Sea Act of 1936 and the Canadian Water Carriage of Goods Act of 1936.

II

The evidence provides ample support for the findings of the trial court that the proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness; that the failures and difficulties outlined in the vessel's radio

messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking; that the vessel was unseaworthy by reason of these factors at the inception of her voyage (see Findings of Fact Nos. IV and V; petitioner's Specification of Errors Nos. II and V) and that petitioner failed to exercise due diligence to make the vessel seaworthy (see Finding of Fact No. VI and petitioner's Specification of Errors Nos. III and V).

A. Presumption of Unseaworthiness.

B. Evidence of a Defective Hull Structure.

C. Evidence of a Defective Steering System.

D. Evidence of the Unseaworthy Condition of the Forward Hatches, the Insecure Carriage and Stowage of Forward Deck Cargo.

III

Petitioner's defense of latent defects.

IV

Petitioner's defense of error in navigation.

V

The privity of petitioner in the failure to exercise due diligence is clearly demonstrated and proved by the testimony of record.

ARGUMENT

I

The finding of the trial court that the storm encountered by the SS PENNSYLVANIA did not constitute a peril of the sea and was not the proximate cause of the sinking of the vessel is amply supported by the evidence and should not be disturbed on this appeal.

A. Evidence that the Storm Was Not a Peril of the Sea.

The trial court expressly found that the storm was not a peril of the sea after hearing extensive testimony concerning the storm in which the SS PENNSYLVANIA sank. Although some of the testimony of these witnesses was conflicting, substantial evidence was received to support the finding and establish that the storm was neither unprecedented or catastrophic, but was on the contrary of a character to be anticipated in the Gulf of Alaska and on the Great Circle Route to the Orient in the winter season. Much of the testimony on this point was provided by experienced master mariners who were present and participants in the very storm in question. We summarize their testimony on the following pages under headings for the names of the vessels upon which they were serving.

CANADIAN WEATHERSHIP STONETOWN

At the time this vessel received the SOS transmitted by the SS PENNSYLVANIA it was located at its desig-

nated Weather Station, where it performed the duty of taking periodic weather observations and reporting them to Vancouver, British Columbia, for redistribution. In addition to its regular crew, this vessel carried a staff of four meteorologists and nine wireless officers (Tr 1946). It was commanded by John W. McMunagle, master mariner with 35 years of sea experience (Tr 1939-1940). Captain McMunagle was a highly qualified witness with experience as a master mariner on all oceans. During recent years he had become particularly familiar with the weather and sea conditions in the Gulf of Alaska during his patrols at the Ocean Station.

Although the STONETOWN was approximately 205 miles from the position reported by the SS PENNSYLVANIA in her SOS (Tr 1970), the STONETOWN was the first ship to reach the scene of the rescue-search area (Tr 1972), where it took command of "on-the-scene search activities" (Tr 1973) at speeds which Captain McMunagle described as "various speeds from half speed up" (Tr 1974) on various courses (Tr 1975) (Exh 146(8)).

It is highly significant that no damage whatsoever was sustained to the STONETOWN, after it departed from its weather station on the morning of January 9, until it first reported damage on January 14. This is all the more significant when it is recalled that the

STONETOWN was proceeding on zig-zag courses and varying speeds during this period of 4 to 5 days while rescue-search activities were in progress. The nature of this operation of the vessel produced the most exacting strain on the structure of the STONETOWN (Tr 1975). Nevertheless, the STONETOWN required no assistance from other vessels and was able to return to port under her own power (Tr 1975).

The STONETOWN arrived at the position of the SS PENNSYLVANIA as reported in her SOS of January 10, 1952 after steaming for 21¾ hours from her position at the Ocean Station (Tr 1971). The STONETOWN continued in full active participation in the search and rescue efforts until the morning of January 15 (Tr 1978).

In describing the storm, Captain McMunagle testified:

> "Q Captain, what would you say would be the usual and expected weather for the vicinity of Weather Station Papa in the winter months?
>
> A Well, you can expect very rough seas and gales of varying degrees of intensity practically throughout the winter.
>
> Q Was there anything unusual or unanticipated about the weather conditions that existed in the month of January, 1952, in the vicinity of Weather Station Papa?

A No.

. . .

Q After you had received the damage on either the 13th or 14th of January—I don't recall your testimony exactly on that—and you were returning to your home port, were you unduly apprehensive as to whether or not your ship would make it?

A No, I was not.

Q Captain, from your experience on a cargo vessel and from your experience with weather conditions in the vicinity of Weather Station Papa, do you feel that a seaworthy loaded cargo vessel would have experienced any difficulty in storms as you observed them, say from the 5th of January until the 14th of January, 1952?

A No, I don't think so." (Tr 1993-1995)

and in response to a question on cross-examination by petitioner testified:

"Q I am asking you pointblank, Captain—you have been on that station two years—have you ever seen a worse sea condition and a worse storm than is described in this log on January 8?

A I have seen as bad. I would not say I have seen worse. I have seen as bad.

Q Have you ever seen it continue as long as this storm did?

A Yes, I have.

Q When you say you have seen them as bad, how many times have you seen any storm as bad as this?

A A storm and possibly the same conditions three or four times on the station since I have been on it." (Tr 2005)

and

"Q Now, Captain, having in mind the conditions of weather and sea and wind that you have heretofore testified to as having been encountered during this period of patrol 5, I will ask you to give us your opinion as to whether or not the STONETOWN would have been able to continue on patrol for the full duration of patrol but for the search activities?

A She would have been." (Tr 2042-2043)

Q "Would your summary be, then, as to your experience that on every wintertime patrol you have encountered storms of this severity?

THE WITNESS: That is correct." (Tr 2047)

JAPANESE VESSEL KOTOH MARU

Seiichi Mori was Master of this vessel, which was some distance west of the SS PENNSYLVANIA. He testified in his deposition (Exh 123):

"Q Captain, was there anything unusual that you recall about the weather and sea conditions that you encountered during this period from January 7th through January 9th?

A Yes, big storm.

Q Big storm?

A Yes, but in winter times, North Pacific Ocean, sometimes we expect the same kind of storm then.

Q Was there anything unprecedented about the storm that you encountered during this period, for this time of the year?" (Tr 1512)

Q "Nothing unusual?

THE WITNESS: (Through Interpreter) Not unusual." (Tr 1512)

and

"Q In your opinion, Captain, would a fully loaded vessel, a seaworthy vessel fully loaded, be able to live through weather and wind and seas such as you encountered on January 7th through January 9th?

. . .

THE INTERPRETER: He thinks a seaworthy boat, fully loaded, could stand for such kind of weather." (Tr 1518-1519)

"Q Will you compare the severity of the storm that you encountered and logged on January 8th with the storm that was encountered on April 24th. Compare the two, please, as to severity.

A All the same, I think, but . . .

. . .

THE INTERPRETER: So he thinks it all must be the same sea condition.

Q The severity about the same?

A Yes." (Tr 1520-1521)

"Q On voyages that you made on other ships across the North Pacific before the war, did you ever encounter weather of the same severity, weather as bad as on this voyage in January, 1952?

A Sometimes." (Tr 1545)

LIBERTY SHIP CYGNET III

This vessel was a Liberty ship commanded by Dennis Brown who had been a Master of only 5 ships and at the time of trial had been ashore for approximately 17 months.

In his opening statement, counsel for petitioner represented to the Court that the Liberty class ship was, as compared to the Victory class ship, inferior in design, strength and power, stating that the Victory ship was "a different type ship, a better ship, a stronger ship in every way, a more powerful and better designed ship" (Tr 105-106). Despite these inferior features, the CYGNET III was seaworthy. She did not have a raised forecastle head, as is the case of a Victory class vessel, and consequently she was more prone to take seas over the bow than a Victory ship (Tr 1664-1665). Captain Brown sought to emphasize the severity of the storm by describing how seas were shipping over the bow and sides, how the vessel pitched and labored and rolled. However, the consistent testimony of experienced witnesses in this case is to the effect that such sea conditions and movements of the vessel were not uncommon in storms in the North Pacific, nor was it uncommon to heave to during a storm.

Reference to the logs of the SS PENNSYLVANIA (Exhs 40, 41, 42, 43 and 44), will readily disclose that

pitching, laboring, rolling and taking seas over the bow or sides, is not indicative of unusual weather. The logs of the SS PENNSYLVANIA bear notations that the vessel, from Voyages 1 to 5, pitched 46 times, rolled 29 times and shipped seas over the bow and sides 44 times.

The storm could not have been as severe as Captain Brown represented in his testimony, in view of the fact that he was able to increase the speed of his engines and change course to enable the CYGNET III to go to the rescue of the SS PENNSYLVANIA. The CYGNET III thereafter participated for a number of days in the rescue-search activities on various courses and at various speeds throughout the complete duration of the storm.

Captain Brown had command of a Liberty type ship, which was acknowledged to be inferior in construction, design and power to the Victory type. Notwithstanding this difference in the quality of his vessel he was only "a little bit worried about it" (Tr 1643).

Petitioner would make much of certain items of damage sustained to the CYGNET III in the storm. Again, however, due consideration must be given to the fact that this vessel spent five days in intensive search operations. During this time it received some heavy weather damage, but such damage was not so great as to require the vessel to terminate its search operations or to return to a United States port for repairs (Tr

1658). In fact, the vessel continued on to Japan where it was necessary to repair only a portion of the heavy weather damage.

In its opening brief, petitioner has endeavored to emphasize items of heavy weather damage sustained by certain other vessels in the PENNSYLVANIA storm. We have pointed out that such damage was in no way disabling, did not affect the respective voyages of the vessels concerned and was sustained primarily by each vessel in undertaking the abnormal courses and speeds involved in the rescue-search operations during the height of the storm and for its full duration. However, an examination of the testimony will prove beyond any question that heavy weather damage is the usual, and not unusual, result of weather encountered in the North Pacific winter season.

Even Captain Brown will admit that heavy weather is to be anticipated:

> ". . . You sometimes get heavy weather damage, but you just don't expect it all the time." (Tr 1660)

The strongest proof of anticipated heavy weather damage is contained in the logs of the SS PENNSYLVANIA for Voyages 1 to 5, inclusive (Exhs 40 to 44, inclusive). On Voyage 1 the propeller was torn off the

poop deck by heavy weather. On Voyage 2, a reel of spring wire had broken off, cutting through four tarpaulins on No. 2 hatch. These incidents were described by Mr. Vallet as ordinary heavy weather damage (Tr 189).

In fact, heavy weather damage is sustained on practically all voyages (Tr 189). For example, on Voyage 4 of the SS PENNSYLVANIA an acid cargo box was torn adrift and damaged the forward starboard boom rest but this incident was described by Mr. Vallet (Tr 190) as an ". . . ordinary routine instance that happens on any transpacific voyage."

The deck log for Voyage 5 of the SS PENNSYLVANIA contains an entry that the deck load fore and aft was shifting and the decks were awash. However, Mr. Vallet says this (Tr 191):

> ". . . happens practically on all voyages."

And Mr. Vallet further testified:

> "Q Then you have told us yesterday about heavy weather damage that you encountered because of storm conditions. Major heavy weather damage is not unusual, is it?
>
> A Not unusual in the wintertime, no." (Tr 231-232)

In determining whether petitioner has carried the burden of proof in establishing that the storm was of a nature to constitute a peril of the sea, we should first examine the testimony of the personnel who were in the storm. Although no one aboard the SS PENNSYLVANIA survived, we have the benefit of radio messages from the SS PENNSYLVANIA during the storm in which she foundered. The first message is contained in the weather report of the SS PENNSYLVANIA where the Master describes the seas as being mountainous (Exh 97). This term is used by mariners to indicate waves at their highest but whether mountainous seas are unusual or unanticipated can best be answered by referring to the deck logs of the SS PENNSYLVANIA which indicate that in the *eleven months preceding her sinking*, mountainous waves were recorded during Voyage 1 and Voyage 5, in the latter voyage on two separate occasions.

The storm must have been abating after the initial weather report of mountainous seas, because we know that at 1400Z January 9, 1952, the time of the origin of the first radio message from the SS PENNSYLVANIA advising of trouble, the seas were reported as very high westerly seas. An examination of the logs of the SS PENNSYLVANIA discloses that very high seas are not uncommon, for the vessel encountered seas of this de-

scription on six occasions during the eleven months of her operation by States Steamship Company.

It should be noted at this point that the U. S. Hydrographic Scale for seamen's description of seas specifies "very high" seas at approximately 20 to 40 feet and "mountainous seas" as approximately 40 feet and over.

The wind at the time of the SS PENNSYLVANIA's first message reporting the hull fracture on the port side was of Force 9 and no one in this proceeding has suggested that a Force 9 wind, Beaufort Scale, is anything unusual, unforeseeable or extraordinary for the North Pacific in the winter season. Actually, as we shall hereafter note, winds of Force 10 or greater were recorded on 133 occasions in the four winter months of November, December, January and February of 1948-49 to 1953-54 (Tr 2176; 2268). From the reports of the SS PENNSYLVANIA itself, it cannot be said that there is any evidence of an unusual storm.

B. Exceptions to Argument of Petitioner on Evidence Relating to the PENNSYLVANIA Storm.

Before reviewing authorities which, when applied to the evidence in this proceeding, eliminate the PENNSYLVANIA storm as an exception to liability under the Carriage of Goods by Sea Act, we must invite attention to a number of representations made by petitioner which particularly are without foundation in evidence.

Under the subheading "STONETOWN", commencing at page 27 of its brief, petitioner ascribes to Captain McMunagle testimony to the effect that if the SS PENNSYLVANIA was nearer than the STONETOWN to the center of the storm, her conditions would be worse (petitioner's brief, p 29). Petitioner then flatly asserts that the SS PENNSYLVANIA *was* "nearer the center, as we shall show." The subsequent showing made by petitioner in this respect appears on pages 51-52 of its brief, where petitioner claims that a plotting on synoptic charts of the position of the various ships on January 9, 1952, will disclose that the SS PENNSYLVANIA was nearer the "eye" of the storm.

The testimony of Captain McMunagle in response to the question of counsel for petitioner relating to the "center of the storm" is entirely without meaning since the expression "center of the storm" was never defined for his benefit. What does petitioner mean by the "center of the storm"? This abstract and technical term is not defined in the entire record of this proceeding. Insofar as the SS PENNSYLVANIA and other ships in the storm area are concerned does it mean the actual geometric center of the storm, or the particular area of the storm in which the most intense weather and sea conditions prevailed? It is obvious that the expression can have two meanings in this respect and no defi-

nition can be found in the record of this case. Captain McMunagle frankly testified that he did not know where the center of the storm was "because we don't go into that at a time like this, it was over such a large area" (Tr 2043). Probably Captain McMunagle applied the term "center of the storm" to that area embracing the most intensive weather and sea conditions.

Petitioner's meteorologist Danielson designated the center of the storm, during a period from 1800Z January 8, 1952 until 0000Z January 10, 1952 on Exhibit 101. He drew a circle on this exhibit showing a radius of about 2° or approximately 120 nautical miles, and placed the center at about latitude 50° North, longitude 138° West (Tr 1303-1304). The entire area "affected" by the storm was larger than the above designated center of the storm and extended *beyond* the Ocean Station (Tr 1304-1305), and Professor Rattray testified that 17 ships, including the SS PENNSYLVANIA, were in "the area of the storm" (Tr 1594). Danielson testified that the most extreme weather conditions in the case of this particular storm were not in the storm center as above described on Exhibit 101, but would be "further south" (Tr 1402). This testimony is difficult to reconcile with that of petitioner's oceanographer Rattray who testified, from his armchair examination of synoptic charts, that on January 10, 1952 winds were

at a higher velocity west and to the northwest of the Ocean Station (Tr 1604). (The center of the 210 mile grid of the Ocean Station is latitude 50° North, longitude 145° West and the position of the STONETOWN at the time she received the SS PENNSYLVANIA's SOS was latitude 50° 27′ North, longitude 146° 30′ West, 205 miles southwest of the SS PENNSYLVANIA, bearing 258° true (Tr 1964; 1966).

In view of the confused status of the record as to the meaning and significance of the term "center of the storm", and its location in the instant case, it is not surprising that petitioner has made no reference in its opening brief to the testimony of its meteorologist and oceanographer in this respect.

Petitioner's assertion on page 51 of its brief that the SS PENNSYLVANIA was nearest the "eye" of the storm has utterly no foundation in evidence. Nowhere in the entire record is the expression "eye of the storm" employed or defined and there is, of course, no testimony as to sea and weather conditions prevailing in the "eye" of this particular storm. If "eye" of the storm means the geometric center, Danielson and Professor Rattray each testified that the conditions would be worse elsewhere than the center of the storm, although testimony of these two witnesses is in conflict on the portion of the storm area which had the most intense conditions. Al-

though the testimony adduced by petitioner as to the meaning and significance of the expression "center of the storm" is confusing and conflicting, it does establish that the portion of the storm in which the most intense conditions prevailed covered a very wide area, and under the testimony of Professor Rattray, 17 ships, including the SS PENNSYLVANIA, were in this storm area.

C. Law as to the Peril of the Sea and Statutory Exceptions to Liability under the Carriage of Goods by Sea Act of 1936 and the Canadian Water Carriage of Goods Act of 1936.

In presenting authorities on this issue, petitioner has overlooked a basic principle well established under the Carriage of Goods by Sea Act of 1936 and its Canadian equivalent, which eliminates the PENNSYLVANIA storm as a peril of the sea, without regard to any question as to its severity.

It is uniformly held by American and Canadian decisions that aside from any question as to intensity and violence of a given storm, the shipowner has the burden of proving that the storm was the sole, proximate cause of the vessel's loss. The storm is not a statutory exception to liability, although of catastrophic magnitude, if it concurred with any unseaworthiness of the vessel proximately causing the loss, and in no event does the storm constitute a defense if the carrier

has failed to prove the exercise of due diligence to make the ship seaworthy. The rule has been stated as follows:

> "The respondent is liable for the damage to the manganese ore caused by the overflowing oil. The carrier has the burden of showing that the loss was due to one of the excepted causes. Further, the carrier has the burden to show that it used due diligence to make the vessel seaworthy for the voyage. . . . If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable . . ." *Union Carbide & Carbon Corp. v. The WALTER RALEIGH*, et al, 109 F Supp 781, at p 793, (D.C.S.D.N.Y., 1951); affirmed 200 F2d 908 (2nd Cir., 1953)

The above principle was recognized and applied by this court under the Harter Act in *The INDIEN*, 71 F2d 752 (9th Cir., 1934). See also *The MANCHURIA*, 34 F2d 843 (9th Cir., 1929), where Judge Wilbur stated, at p 845:

> "In view of these circumstances, it is clear that the storm was of such violence and at such a time

as to constitute a peril of the sea, exempting the ship-owners from liability in the event that the ship was seaworthy. If the ship was not seaworthy within the meaning of the rule on that subject, so that the cargo was liable to be damaged by a storm of ordinary intensity, the fact that the particular storm which did the damage was of extraordinary violence would not exempt the owner from liability."

The rule has been consistently stated in other circuits as follows:

Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co., Inc., 189 F2d 488 (4th Cir., 1951), at p 491:

"Proof that sea water entered the cargo tanks raises a presumption of 'unseaworthiness' which the vessel appellant here must rebut by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea. *This heavy burden is not carried if the issue is left in doubt.*" (Emphasis supplied)

The SS ASTURIAS, 40 F Supp 168, at p 173, (D.C.S.D.N.Y., 1941), affirmed, 126 F2d 999 (2nd Cir., 1942):

"Quite apart from the Carriage of Goods By Sea Act, it is the duty of the carrier under the General Maritime Law, when the cargo is not delivered in the like order as received, to show affirmatively that the damage arose from an excepted peril . . .

"The Asturias encountered rough weather and high seas, not, however, unusual for the season of the year on that route. No structural damage was sustained by the vessel. Mere proof of damage to

> cargo by sea water is insufficient . . . The efficient cause must be sought in those conditions or events which account for the entrance of sea water . . . Since that case, the court was unable to determine the cause of the entrance of the sea water into the vessel, the doubt was resolved against the carrier . . ."

See also *The CYPRIA*, 137 F2d 326, at p 329, (2nd Cir., 1943), 1942 AMC 985 where the court disposed of the shipowner's contention that the vessel's rivets may have been weakened by encountering ice, as follows:

> " . . . Were the ice the sole possible cause of the damage this might be a reasonable suggestion, but not here, *where there are other pre-existing, and at least equally proximate, causes,* which the shipowners failed to exercise due diligence to avoid. The burden was on the shipowners to bring the ship within the statutory exemption from liability for unseaworthiness." (Emphasis supplied)

The Canadian Act was referred to in *The IRISTO,* 43 F Supp 29 (D.C.S.D.N.Y., 1941), at pp 35-36, as follows:

> "All of the through bills of lading issued by the Canadian railroads incorporated the Canadian Water Carriage of Goods Act, which relieved a carrier if the loss was due to negligence in navigation or management, *provided, of course, that a seaworthy ship was furnished and/or due diligence was exercised by the owner and/or carrier to make the ship seaworthy.*" (Emphasis supplied)

That the peril of the sea exception to liability must be proven the sole proximate cause of the loss has been consistently recognized under the Canadian Water Carriage of Goods Act of 1936. See The *KEYNOR*, 1943 AMC 371, (Supreme Court of Canada), and *The ARLINGTON*, 1943 AMC 388, (Supreme Court of Canada).

The rule is generally stated in 80 CJS (Shipping), § 125, at p 936, as follows:

> "Proximate cause. In order that the act of God may excuse the carrier, it must be not only the sole, but the immediate, and not the remote, cause of the loss. The carrier is not excused where his negligence is a concurring cause, although an act of God may have been the immediate cause."

The extent of the burden imposed upon a carrier to prove a statutory exception to liability as the sole proximate cause of the loss was recognized by this court in *The INDIEN*, 71 F2d 752 (9th Cir., 1934), at p 756, as follows:

> "*From the foregoing, it will be seen that, in a case like this, the problem before the chancellor is not that of a nice balancing of evidence, pro and con, on delicate scales. After a careful study of the testimony and the exhibits, he must, in order to find for the shipowner, be convinced beyond at least a substantial doubt that the vessel was in fact seaworthy.*" (Emphasis supplied)

The burden imposed upon the carrier under this rule is illustrated by the following statement of the United States Supreme Court in *The SOUTHWARK,* 191 US 1, 48 L ed 65, (1903) at p 72:

> "But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried; and if, by the failure to adopt such tests and to furnish such proofs, *the question of the ship's efficiency is left in doubt,* that doubt must be resolved against the shipowner, and in favor of the shipper." (Emphasis supplied)

See also *Standard Oil Co. (N.J.) v. Anglo-Mexican Petroleum Corp.*, 112 F Supp 630 (D.C.S.D.N.Y., 1953).

In its effort to qualify the PENNSYLVANIA storm as a peril of the sea exception to liability, petitioner has lost sight of the basic rule on causation, as outlined in the foregoing authorities. Even if the storm was of such violent proportions as to otherwise constitute a peril of the sea, it is not a defense unless proven to be the sole cause of the loss. The burden of this proof is on the carrier, and is not sustained if the issue is left in doubt.

The evidence establishes, and the trial court has found, that various factors of unseaworthiness com-

bined to cause the sinking of the SS PENNSYLVANIA. Even if it should appear that a violent storm otherwise qualifying as a peril of the sea, combined with the unseaworthiness to cause the loss, under all authorities the storm will not qualify as a statutory exception to petitioner's liability.

However, the trial court also held that the storm was not so severe as to constitute a peril of the sea and the finding in this respect is well supported by the evidence and the most recent and well considered decisions.

Petitioner conspicuously omits any reference to the leading decision of the Ninth Circuit, involving a storm in the North Pacific, *The INDIEN*, 71 F2d 752 (9th Cir., 1934). In that case this court reviewed testimony concerning the storm encountered by the vessel in question as follows at p 754:

> "On February 7, the ship ran into a North Pacific winter storm. The weather increased in severity on February 8 and 9. Moller, the first officer of the Indien, testified that on the latter date the velocity of the wind 'was along sixty miles [an hour] generally, and up to ninety miles in gusts.' Capt. Moloney, a marine surveyor, with a third of a century of maritime experience, declared that on a North Pacific voyage in the winter months, a 'vessel is continually shipping heavy seas . . . on her deck,' that February is considered one of the three worst months in those waters, that 'there is

> nothing else to be expected except heavy gales,' and that it is 'a very stormy passage'."

The court did not rule on the peril of the sea issue in the above case since the shipowner left in doubt proof as to the seaworthy condition of the vessel or the exercise of due diligence with respect thereto and exoneration was, accordingly, denied.

The tests most uniformly and recently applied in determining the qualification of a storm as a peril of the sea are illustrated by the following decisions:

In *The CLEVECO*, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944), the court defined a peril of the sea as follows, at p 81:

> "What is a 'peril of the sea' has been the subject of many judicial interpretations, but most of the authorities agree that the weather, to reach proportions that would absolve owners of liability for injury or loss, must be 'irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception and not a common occurrence at that season of the year' . . .".

In the case of *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), the court said at p 491:

"The excepted 'peril of the sea' does not come into play merely upon proof that the vessel encountered heavy seas and high winds, if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel . . .".

In *The VIZCAYA*, 63 F Supp 898 (D.C.E.D.Pa., 1945) the court said, at p 903:

"The contention that the damage was occasioned by perils of the sea is, in my estimation, ill-founded. True, the weather at times was severe, but considering that the voyage involved crossing the North Atlantic in the winter season, it cannot be said that the weather encountered was not to be anticipated. The weather was not 'catastrophic', or 'of such a nature' as to constitute a good exception in the statute or the bills of lading . . .

"The proper approach is indicated in Societa Anonima, etc. v. Federal Ins. Co. (The Ettore), 2 Cir., 62 F.2d 769, at page 771, 1933 A.M.C. 323 at page 326: 'Gales are likely at all seasons in the Atlantic, and this was at most not more. She should have been able to withstand it, else she was not reasonably fit for the duties she had undertaken, and was therefore not seaworthy'."

In the case of *The ARAKAN*, 11 F2d 791 (D.C.S.D. Cal., N.D. 1926), the court commented as follows with regard to heavy weather, at pp 791-792:

"Claimant's initial position is that the leakage resulted from 'heavy, tempestuous, and extraordinary' weather, amounting to a peril of the sea, which as such would be excused by the provisions of its bills of lading. *This defense, to say the least, is without novelty; it is the carrier's best, though least dependable, friend.* Judged by well-known and usually adopted tests, it must fail in this case, because it is apparent from the evidence that the weather encountered by the vessel, if not actually anticipated, certainly was of a kind reasonably to have been expected on a trans-Pacific voyage, and hence not a peril of the sea . . . There was, in brief, nothing 'catastrophic' about it." (Emphasis supplied)

In the case of *THE SOUTHERN SWORD*, 190 F2d 394 (3rd Cir., 1951), it appeared that a barge filled with coal sank in a Force 7 gale. Holding that this wind did not constitute a peril of the sea the court said, at p 396:

"The prevailing and, in our judgment, correct judicial view was expressed in The Manual Arnus, D.C.S.D.N.Y. 1935, 10 F. Supp. 729, 732: '. . the weather must be irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception . . .' "

In the case of *The WEST KEBAR*, 147 F2d 363 (2nd Cir., 1945), it appeared that in the month of January damage to cargo was caused by a deck load

coming adrift and breaking openings in the deck, similar to the events which occurred on the SS PENNSYLVANIA. A wind of Beaufort Scale Force 9 and 10 during a storm in the North Atlantic with seas over the deck was responsible for the deck load coming adrift. The court held that such a storm was not unexpected or catastrophic, but in fact to be expected in such waters at such season.

Petitioner refers to a definition advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, 106 F2d 32 (2nd Cir., 1939), to the effect that the phrase "perils of the sea" means "*nothing more, however, than that the weather encountered must be too much for a well found vessel to withstand*". (Emphasis supplied) A similar standard was recognized and applied in a recent case by the Fourth Circuit, *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), where the court stated, at p 491:

> "The excepted 'peril of the sea' does not come into play . . . if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel."

The present rule of the Second Circuit is illustrated by the case of *The WEST KEBAR*, 147 F2d 363 (2nd

Cir., 1945), where the court stated, in disallowing a defense of a peril of the sea, at p 366:

> "The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. *We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season.*" (Emphasis supplied)

It is apparent that under the very test advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, supra, and quoted at page 53 of petitioner's brief, the PENNSYLVANIA storm fails to qualify as a peril of the sea. We have previously reviewed the evidence that 16 well found ships operating in the area of the PENNSYLVANIA storm successfully withstood the full duration of the wind and sea conditions in which the SS PENNSYLVANIA foundered. These vessels sustained no serious damage and completed their respective voyages without assistance. This evidence alone eliminates the storm as a peril of the sea under the standard advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, supra. In the instant case we have even stronger evidence which precludes the defense of a peril of the sea under this stand-

ard. As previously pointed out, several of the aforementioned 16 vessels did not merely heave to and ride out the storm in normal navigating procedure under such circumstances. To the contrary these vessels, including a Liberty class vessel, which petitioner admits is inferior in design, strength and power to the SS PENNSYLVANIA, actively maneuvered in search and rescue operations throughout the height and full duration of the storm.

It is significant that none of the cases cited by petitioner in its opening brief involved factual situations, comparable to this case where other vessels did not merely seek protection or relief from the storm but actively engaged in search and rescue efforts. Likewise, none of the cases relied upon by petitioner involved factual situations where other vessels comparable or inferior in size, design or power were reported to have successfully withstood the force of the same storm encountered by the vessel which was involved in the litigation.

Petitioner asserts that the finding of the trial court that the storm was not a peril of the sea is predicated on the sole fact that all other vessels in the storm area withstood the wind and seas. In this connection, petitioner cites on pages 58 and 59 of its brief two earlier cases to the effect that a peril of the sea defense is

not lost by a mere showing that a "stouter" ship would have outlived the storm. The irrelevance of these decisions to the instant case is manifest. In the instant case, the record shows that a weaker vessel, inferior in size, strength and power, not only withstood the storm, but was subject to the most exacting ordeal of participating throughout the entire duration of the storm in rescue-search operations.

The finding of the trial court that the PENNSYLVANIA storm was not a peril of the sea, available to petitioner as a statutory defense, is clearly supported by:

1. Petitioner's failure to prove that the storm was the sole and proximate cause of the loss and the evidence, as the trial court found, that the vessel's unseaworthiness was the proximate cause of her loss.

2. Petitioner's failure to prove the exercise of due diligence to make the vessel seaworthy.

3. The testimony of the most qualified and experienced master mariners that the storm was a typical storm in the Gulf of Alaska, neither unprecedented or catastrophic, but of the character to be anticipated on the Great Circle Route in the winter season.

The trial court's finding that the storm was not a peril of the sea is abundantly supported by the evidence, and the authorities. The integrity of this finding should not be disturbed on appeal. See *McAllister*

v. United States, 348 US 19, 99 L ed 20, (1954); *International Nav. Co. v. Farr*, 181 US 218, 45 L ed 830, (1901).

II

The evidence provides ample support for the findings of the trial court that the proximate cause of the sinking of the PENNSYLVANIA was her own unseaworthiness; that the failures and difficulties outlined in the vessel's radio messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking; that the vessel was unseaworthy by reason of these factors at the inception of her voyage (see Findings of Fact Nos. IV and V, and petitioner's Specification of Errors Nos. II and V), and that petitioner failed to exercise due diligence to make the vessel seaworthy (see Finding of Fact No. VI and petitioner's Specification of Errors No. III and IV)

We submit that the above findings are entirely clear but in view of petitioner's professed inability to understand them (see petitioner's opening brief page 61 et seq.), we shall briefly outline the basic elements of these findings.

The trial court found that the specific failures and breakdowns reported by the vessel's radio messages were each "factors" — or in other words the active physical product or consequence — of unseaworthy

conditions prevailing at the inception of Voyage 6, and that these active factors were incidents of such unseaworthiness which combined to cause the ship's loss as follows:

1. The 14 foot crack on the port side, allowing the entrance of sea water into the engine room, was an active factor of unseaworthiness contributing to the vessel's loss, and was the product of the unseaworthy condition of the hull at the inception of Voyage 6, for the route to be traversed and weather to be encountered.

2. The complete failure or breakdown of the vessel's steering systems in heavy seas was a contributing cause of the loss and an active factor or product of the faulty, unseaworthy condition prevailing in the machinery of the steering systems at the inception of Voyage 6.

3. The vessel took water in No. 1 hold, which contributed to her loss. This again was a direct product of the unseaworthiness of the hull at the inception of Voyage 5. (Since there is no evidence that the No. 1 hatch came open, and no cargo was stowed in the way of this hatch, a further break in the vessel's hull was the only possible source of the entry of water in No. 1 hold.)

4. The drifting deck cargo took off the tarpaulins on the forward hatches and No. 2 hatch was open and full of water. This event was a factor of unseaworthiness contributing to the vessel's loss. It was the product of unseaworthy and insecure conditions of the forward hatches, and the improper and unseaworthy stowage of cargo on the vessel's forward deck at the inception of Voyage 6.

The following evidence provides ample support for Findings of Fact IV and V, as above outlined:

A. Presumption of Unseaworthiness.

A presumption that the SS PENNSYLVANIA was unseaworthy at the inception of her voyage has been established in respect to each of the many failures and breakdowns which contributed to and proximately caused her loss. These presumptions imposed upon the carrier the duty of coming forward with an explanation for these failures consistent with its right to exoneration under the Carriage of Good by Sea Act of 1936 and the equivalent Canadian statute. The uniform application of this rule is illustrated by the following authorities:

In the case of *The MEDEA*, 179 F 781 (9th Cir., 1910), the court held that the presence of seawater in cargo compartments raised a presumption of unsea-

worthiness and it was on the vessel to prove that the damage was caused by a peril of the sea.

The above rule was recognized by the Second Circuit in *The SS ASTURIAS*, 126 F2d 999 (2nd Cir., 1942), where the court stated at p 1001:

> "Proof of the presence of seawater, it cannot be disputed, raises a presumption of unseaworthiness which the carrier must rebut."

With further regard to the presumption, the court stated:

> "As the trial court found that the ship failed to rebut the presumption of negligence created by the presence of seawater, and as seawater contributed to the damage in some unknown degree, the ship is liable for the whole damage."

As stated in *Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), at p 491:

> "Proof that seawater entered the cargo tanks raises a presumption of 'unseaworthiness' which the vessel appellant here must rebut by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea. . ."

In *Metropolitan Coal Co v. Howard*, 155 F2d 780 (2nd Cir., 1946), Judge Learned Hand stated at p 783:

> ". . . courts have recognized over and over again that unfitness developing in a vessel shortly after she breaks ground, is proof enough of unseaworthiness."

In *The PLOW CITY*, 122 F2d 816 (3rd Cir., 1941), the court stated at p 818:

> "A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port. The fact must be affirmatively proven. . . The owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston."

In *The SOUTHERN SWORD*, 190 F2d 394 (3rd Cir., 1951), the court in referring to the rule where a contract of private carriage is involved, stated, at p 397:

> "It is true that in such circumstances the burden of showing unseaworthiness is upon the complaining shipper . . . But the logical inference of unseaworthiness which follows from the unexplained sinking of a vessel in weather she should be able to withstand suffices to discharge that burden unless and until the carrier shall affirmatively show exculpatory circumstances."

It should be noted that although *The SOUTHERN SWORD*, supra, involved a private carriage, the court held that the presumption of unseaworthiness arising from the sinking of the vessel in question was sufficient to throw the entire burden upon the carrier of relieving itself of liability.

In *The CYPRIA*, 137 F2d 326 (2nd Cir, 1943), the court observed that the storm in question did not constitute a peril of the sea in view of the fact that the wind and sea conditions were not extraordinary for the season of the year, and further stated at p 328:

> "Moreover, other circumstances show that the vessel was not seaworthy for the voyage. This might be presumed from the mere loss of the rivet in the absence of redeeming sea perils."

In this case the court held the vessel unseaworthy because of a defective rivet which allowed seawater to enter the cargo holds. The court also held that there was insufficient evidence of due diligence by the carrier in inspection of the defective rivet and that the vessel owner accordingly assumed the risk of damage arising from the unseaworthiness.

The severe burden imposed upon a shipowner to bring itself within the statutory exception to liability is not only illustrated in *Artemis Maritime Co., Inc. et*

al v. Southwestern Sugar & Molasses Co., supra, and other cases cited, supra. but in *The INDIEN*, 71 F2d 752 (9th Cir., 1934), where the court stated, at p 755:

> "At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rests upon the shipowner. *Any doubt must be resolved against him*, 'with the presumption in favor of the appellee that it was the fault of the appellant.'" (Emphasis supplied)

The above principle has likewise been adopted and applied by Canadian courts as illustrated by *The ARLINGTON*, 1943 AMC 388, where the Supreme Court of Canada expressed the rule as follows, at p 390:

> "The primary duty of the respondent, therefore, being to properly and carefully load, handle, stow, carry, keep, care for and discharge the wheat, the onus was upon it to show the cause of the loss and bring itself within one of the exceptions. The shortness of the time that elasped between the sailing of the *Arlington* from Port Arthur and its foundering is a circumstance to be taken into consideration in deciding whether the ship was unseaworthy."

Under the evidence and the authorities reviewed above a presumption of the unseaworthiness of the SS PENNSYLVANIA at the inception of her Voyage 6 has clearly been established with respect to the hull

of the vessel, the forward hatches, the insecure and unseaworthy stowage of deck cargo and the vessel's steering system. In dealing with each of these unseaworthy conditions we shall show that the petitioner has failed to rebut the presumptions of unseaworthiness by coming forward with an acceptable explanation of the cause of the several failures and breakdowns which would bring petitioner within one of the statutory exceptions to liability. In addition we shall also review the substantial affirmative evidence supporting the finding of the trial court that the SS PENNSYLVANIA was unseaworthy.

B. Evidence of a Defective Hull Structure.

In *The SILVIA*, 171 US 462, 43 L ed 241 (1898), the Supreme Court laid down the following rule as to a vessel's seaworthiness:

> "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she had undertaken to transport."

The season and waters to be traversed on the voyage in question are to be taken into account in determining the fitness of the ship. As stated in *The M. J. WOODS*, 206 F2d 240 (2nd Cir., 1953), at p 243:

"A vessel is unseaworthy unless she is reasonably fit to carry her cargo safely despite the perils to be anticipated on the voyage."

The SS PENNSYLVANIA (formerly the Luxembourg Victory) was sold by the United States government to petitioner, without warranty under bill of sale effective February 17, 1951.

Between 1944 and January, 1951, the vessel was owned by the United States government and operated in the Pacific area. The record is replete with damage sustained by this vessel commencing with her first voyage in 1944 when she ran over a reef. At the time she struck the reef the vessel was empty with no ballast and traveling at a speed of 13 or 14 knots (Tr 2221-2222). As a result of this incident, the ship's hull sustained serious bottom damage which was later repaired at San Francisco (Exh 147).

While the vessel was owned by the United States government she sustained extensive damage to her hull and frames as a result of heavy weather, collisions and groundings. This damage was at times repaired by complete replacement of damaged plates, at other times by repairs to the damaged plates and at times by merely restoring the plates to their original shape (Exh 147; Tr 2391 through 2430 and 2439 through

2585). Based on a survey of the vessel in December, 1950, surveyor J. D. Gilmour testified that "both sides of the ship from one end to the other were very, very seriously damaged" (Tr. 2383).

American Bureau of Shipping Survey Report 3076, dated May 6, 1948, (Exh 147) noted that the bottom plating of the vessel from No. 2 to No. 5 double bottoms was wavy, the deepest distortions being ¾" to an inch and the average distortion being ¼ of an inch. This wavy bottom condition was never repaired or corrected (Tr 2401).

American Bureau of Shipping Survey Report 8785, dated January 12, 1951 (Exh 147), noted a small amount of hog in the vessel's bottom although marine surveyor Francis P. Miller testified that when the SS PENNSYLVANIA was launched there was no hog in the original construction (Tr 418).

When petitioner took title to the vessel it was provided with complete survey reports reflecting previous surveys, both damages and repairs. Despite this information there is absolutely no evidence that petitioner made any inquiry as to whether the vessel had a hog at the time of its original construction. The survey reporting the hog was apparently forgotten by petitioner for there is no evidence that petitioner made

any of the recognized tests or inspections by transit, level or wire to determine whether the vessel had a hog or not.

Testimony at trial also disclosed the existence of the following main deck fractures on the vessel, discovered in February, 1951:

> 4 deck fractures around pad eyes between No. 4 and No. 5 hatches (Tr 404, 445); 2 separate fractures of the main deck plates on the starboard side between No. 2 and No. 3 hatches in the way of 2 deck pads (Tr 617, 638).

The above fractures affected the seaworthiness of the vessel and had to be repaired before a certificate of seaworthiness could be issued (Tr 618, 645, 648). The seriousness of any crack in the deck plates of a welded steel vessel is illustrated by the following testimony of petitioner's witness Commander Rivard:

> "A As to the importance, any fracture is important". (Tr 618-619)
>
> "Q In other words, from your answer to my question I think you have stated that where there is a crack in the plates there it was an essential repair job, and as I understood it the vessel was not seaworthy until such repairs were made to those cracks; is that correct?
>
> A On the main deck?
>
> Q Yes, on your pad eyes.
>
> A Yes. When I use the expression seaworthiness in that case, it was a fracture that I had found,

and it goes without saying that if in a case like that, if I find a fracture, it must be repaired before I can pass on it.

Q Well, the vessel is not seaworthy until it is repaired, is it?

A That is correct.

. . .

Q Would those 8-inch cracks in the deck of the vessel affect her seaworthiness?

A Yes, they can." (Tr 647-648)

In our opening brief we have referred to the 22 foot fracture in the main deck, sustained by the SS PENNSYLVANIA on November 2, 1951 during Voyage 5. The vessel suffered this casualty while proceeding in heavy weather with an air temperature of 54° and a water temperature of 60° (Exh. 44) and it is established that the 22 foot crack originated at a pad eye on the starboard side of the vessel (Tr 167).

The origin of this crack is found in the uncontradicted testimony of Morgan L. Williams, an expert metallurgist employed by the Bureau of Standards, who tested a sample of the deck plate of the SS PENNSYLVANIA submitted by the U. S. Coast Guard to the Bureau of Standards for examination (Tr 1871; Exh 136). Mr. Williams testified that this Class 1 fracture started from an old and apparently visible crack at a pad

eye on the starboard side of the vessel's deck. As an expert metallurgist he also testified that on the basis of rust deposits this fracture had existed for a long time and in his opinion *was not a hairline crack* (Tr 1885-1887).

Petitioner's callous indifference to the safety of the ship and those that sailed upon her is once more demonstrated by the failure of Mr. Vallet to inspect the deck of the vessel for the existence of cracks around the pad eyes of the same kind that caused the crack on Voyage 5. Although no real examination was ever made of any other area on the deck, petitioner had at hand, in addition to Mr. Vallet and others at the vessels home port in Portland, ample personnel and facilities for making even a perfunctory examination. For example, we note the earlier incident when a spare propeller was lost from the poop deck of the SS PENNSYLVANIA, following which the petitioner had in attendance upon the vessel its general counsel and a member of its board of directors. These personnel were aboard the vessel in the company of a metallurgist, because petitioner was making a claim for the damage done to its vessel.

The significance of the hog noted in the vessel, the deformation evidenced by the wavy bottom plates, and the numerous incidents of fractures sustained in the main deck plates of the vessel is emphasized in the

testimony of Robert A. Hechtman, an eminently qualified structural engineer, whose scholastic qualifications were not equaled by any other witness. He commenced his career with the practical experience of building steamships and since 1945 concerned himself with the problems associated with brittle fracture in welded steel vessels. Mr. Hechtman has studied with, and has conducted experiments for, the Committee of Ship Construction of the War Metallurgy Board, the Office of Naval Research, the Navy Department, the Ship Structure Committee, the Bureau of Shipping and he has worked with the American Welding Society and the National Research Council (Tr 2340-2353).

Mr. Hechtman's attention was directed to surveys of the ship and the numerous incidents of fracture sustained in the main deck. With reference thereto, he testified as follows:

> "Q Mr. Hechtman, based upon your examination of the surveys described in your Table No. III and the testimony concerning the cracks in the hull structure as related to us earlier in your testimony, do you have an opinion as to whether or not the PENNSYLVANIA as a welded steel structure was sound or unsound as of January 5, 1952, the time of her sailing on Voyage No. 6? You will answer that Yes or No.
>
> A Would you read that question, please? (Question read.)
>
> THE WITNESS: I will answer yes.

Q What is your opinion?

. . .

A My opinion is that it was not entirely sound. It is based on this feeling. A number of cracks have been noted in the deck of this ship. I would expect to find other cracks also if the ship—if I were to inspect the ship very closely. I would feel that the indication of some cracks points to the definite possibility of other cracks; therefore, the possibility that the ship did go out to sea with unrepaired cracks in her structure. For that reason I would have my doubts as to her soundness." (Tr 2586-2587)

"A . . . there are fractures through the midbody the length of the deck of the vessel, and some of these fractures are quite symmetrical with the center line of the vessel, indicating that the deck of the structure was heavily stressed in tension, the tension stresses in the areas from bending in a hogging manner.

. . .

Q . . . if the vessel was hogged it would set up tension on the deck more or less immediately above the hogging.

A That is correct.

. . .

A . . . and of course a distance on either side of it.

. . .

Q Now is it your testimony that this ship was weakened as indicated by the little cracks on the deck, and is your testimony that that all resulted from this hogging business?

A My testimony would be that it would appear that that would be the case.

. . .

A . . . there would also be high stresses forward and aft of that area.

. . .

Q Do you consider those minute cracks to be evidence of a severe and extraordinary strain on the vessel's deck?

A Yes, I do.

. . .

A . . . in a welded structure I would consider those cracks as something dangerous." (Tr 2596-2602)

"Q . . . Now the significance, Mr. Hechman, of the cracks that you have just related is what?

A That they are sources of future fractures. They are danger spots in the ship." (Tr 2370-2371)

"Q How are the forces which tend to produce bending in the hull, as you have described, related if at all to the fracture on Voyage 5?

A The damage on Voyage 5 is covered in Table 3 by Items 44 to 48, inclusive. These indicate a rather symmetrical nature of the damage with respect to the center line of the ship.

. . .

A A rather symmetrical nature of the damage with respect to the center line of the ship. For example, Items 44 to 48, together with the previous testimony in the transcripts, indicated that the pad eye fractured on both the port and starboard sides of the ship, and at two pad eyes symmetrically placed with respect to the center line of the ship. The welds port and starboard in Item No. 47 between the longitudinal bulkhead H-stanchion and the longitudinal girders fractured port and starboard.

In Item No. 48 the welds port and starboard—to the port and starboard corners of the deckhouse fractured. Those are the welds between the deckhouse corner and the deck. The observation that I made was that therefore the hull was bent in a vertical direction rather heavily.

. . .

A . . . In other words, it would cause what the ship people call a hogging moment." (Tr 2448-2449)

"Q Mr. Hechtman, are the forces which tend to produce the bending in the hull and the hogging moment which you have related in any way connected or associated with the crack which developed on Voyage 6 at Frames 93 and 94 port side?

A I have already described a number of incidents which potentially could have caused heavy hogging moments in the hull girder. And particularly those included the grounding described in Item No. 1 of my Table 3, and the fracture on Voyage 5 described in Items 44 to 48, inclusive, of my Table 3.

Going back to the grounding in the Fiji Islands it would appear from the nature of the structural damage that the ship struck in the vicinity of Bulkhead 95 or thereabouts. That would mean that heavy bending stresses causing higher tension stresses in the deck of the ship immediately above the point at which it sprung would be developed.

In the case of Items 44 to 48 in Table 3, the symmetrical nature of the damage has already been described. The bending of the ship which placed the deck in tension and sufficient to cause a group 1 casualty at Frames 72 to 74, which is approximately 60 feet forward of Frames 93 and 94.

Q How many feet forward?

A Approximately 60 feet forward. The hull is 440 feet long, so 60 feet is not a very great fraction of that length. It would appear, therefore, that the area in the region of Frames 93 and 94 should also have been rather heavily stressed.

. . .

Q All right. Now, you have discussed the forces which would bend the hull and which you described as a hogging moment. Have you found anything in these surveys of lateral forces to the starboard side of amidships which would tend to overstrain the port side shell plating?

A Yes, I have. I am speaking now of the more or less horizontal forces which would strike the ship starboard in amidships portion so as to place the port side shell of the ship in tension. I can judge the nature of these forces only by the severity of the damage which will be incurred when they strike the ship, and I refer to Item No. 10 in Table 3 which refers to the A.B.S. Report No. 1188 dated November 2nd, 1947. The nature of the damage there is extensive damage to frames and beams, Frames 54 to 58 starboard side.

I have already read the excerpt from the ship's log describing the weather conditions under which this occurred. Sheets numbered 2 and 3, I believe, cover all the damage to the hull. There is a Sheet No. 4 which does not, I believe, cover any damage to the hull structure itself. They list a number of items in which the frames and some of the welding and stiffener angles were bent or fractured." (Tr 2293-2295, 2452-2454).

The wavy bottom plates on the SS PENNSYLVANIA were never corrected and Mr. Hechtman's testimony on this point is as follows:

"Q The bottom plates that were replaced, Mr. Hechtman, how did they compare either in number or in area with the bottom platings that were noted as being wavy in Item No. 13?

A I believe there are about 60 plates, between 50 and 60 plates which would be called the bottom of the ship lying between, lying from the forward end of No. 2 hatch to the aft end—forward end of No. 2 hold to the aft end of No. 5 hold, and I have noted one plate, I believe previously, which was renewed.

. . .

THE WITNESS: "The requirements of Lloyd's with respect to distortions greater than ⅜ of an inch is that the bottom be strengthened as soon as possible." (Tr 2402-2405).

"Q Mr. Hechtman, do you agree with the requirements of Lloyd's with respect to distortions in excess of ⅜ of an inch in bottom?

A Yes I do." (Tr 2406)

"THE WITNESS: The action of a member in compression which is bent is impaired to the extent, if the distortion is ⅜ of an inch in a distance of 30 or 36 inches as it is in the case of most ships, to the extent that if it is heavily loaded that member will be forced to deform permanently. It is the hope of the designers that their members will not be forced to deform permanently under load."

(Tr 2406-2407)

"Q What effect, if any, did the distortion have upon the susceptibility of the vessel to brittle fracture?

. . .

A The bottom plate of this ship, as I remember, was somewhat under three-quarters of an inch in thickness, if my memory is correct. It spans a distance of three feet, which is the frame spacing, and if adjacent panels are distorted most of that distortion exists in the central portion of the span between frames. And the distortion of three-quarters of an inch must have been a permanent distortion, and therefore the material must have yielded. Since it has been permanently distorted, permanently yielded, it must therefore be subject to the phenomenon of strain aging.

Q In the manner that you have described as shown by your tests?

A Yes. There is also another effect of wavy bottom plating which is separate from that of strain aging.

. . .

Q What is that other effect?

A It is the effect upon the strength of the hull girder as a whole." (Tr 2418-2419)

"A . . . permanent crookedness or curvature in a compression member, reduces its strength.

Q Is that the other effect that you mentioned with respect to the significance of wavy bottom as noted in Item No. 13?

A That is correct." (Tr 2422)

Mr. David P. Brown, defending the position of the American Bureau of Shipping that a wavy bottom plate on a welded steel merchant vessel is not significant (Tr 2790-2791) admitted that the Ship Structure Committee has commenced consideration of this problem. Mr. Brown also testified that where a waviness occurs in the forward portion of the bottom of the vessel, the bottom plates are repaired. In so testifying, he stated:

> "Q Whey do they repair them?
>
> A Because if you let it go it simply gets progressively worse. It is a slamming condition.
>
> Q Then what happens?
>
> A If it gets bad, it will start some fastenings and rivets coming loose, or with the welded ships you may even develop small fractures at the point where it crosses the floor or the girder in the bottom." (Tr 2798)

Mr. Brown admitted that the condition of wavy bottom has required strengthening of the tank tops; the same strengthening which Mr. Godfrey testified should have been done after the Class 1 casualty which occurred on Voyage 5 (Tr 2158; 2161). The Maritime Administration has proposed such strengthening (Tr 420); the Coast Guard in some districts has required it (Tr 2492); Lloyd's Registry of Shipping requires strengthening of the tank tops (Tr 2813), as does the

Bureau Veritas (the French Classification Society), and The Netherlands Shipbuilders Research Association (Tr 2787). It is significant indeed that the *JOPLIN VICTORY*, while being operated by the State Steamship Company, had her tank tops strengthened after it sustained the second Class 1 casualty ever sustained by a Victory ship (Tr 2908-2909). The refusal of petitioner State Steamship Company to follow safe practices in the maintenance of its ships is demonstrated by the fact that of the five Class 1 casualties sustained by Victory class ships in over 2,000 ship years' experience, three of those casualties were sustained by ships operated by petitioner State Steamship Company.

It is apparent from the testimony of Professor Hechtman that the hull structure of the SS PENNSYLVANIA had been subjected to abnormal stresses producing a condition known as "strain aging" (Tr. 2427-2428) which increased its susceptibility to brittle fracture in cold temperatures (Tr 2413-2414). This serious weakness of the hull of the vessel is convincingly confirmed by the fact that the vessel on Voyage 5 sustained her first Class 1 hull casualty, consisting of a 22 foot deck fracture, in an air temperature of 54° and a water temperature of 60° which is admitted by petitioner's witness David P. Brown to be a relatively high temperature in which to sustain a hull fracture (Tr 2773).

The significance of this major hull fracture is found in the findings of the Ship Structure Committee of the Board of Investigation, incorporated into "The Design and Method of Construction of Welded Steel Merchant Vessels", Section H, Finding G, p 9 (Exh 185) where it is reported:

> "The highest incident of fracture occurs under the combination of low temperature and heavy seas."

The foregoing 22 foot deck fracture was classified as a Class 1 casualty, defined by the Ship Structure Committee as one which has weakened the main hull structure so that the vessel is lost or in dangerous condition (Tr 1864-1865) or one where the strength of the structure is so weakened that it would be in imminent danger of further failure (Tr 2770). This was the first Class 1 casualty suffered by a Victory ship in over 2,000 ship years' experience (Tr 2767-2770).

The record discloses that after the vessel sustained the above casualty on Voyage 5 it returned to Portland, Oregon in heavy seas and during her return to port the crack in the stringer plate was opening and closing ¼ of an inch (Tr 364). Petitioner's witness, David P. Brown, recognized the further stress thereby imposed upon the vessel's hull in the following testimony:

"Q . . .

We have these factors: A Victory ship which has sustained a Class 1 casualty such as a crack that was sustained by the PENNSYLVANIA on Voyage 5. While that crack existed the ship was heavily loaded. The seas were high. It was returning to the mainland at high speed.

Would it be reasonable to expect that coupled with the loss of strength resulting from the original fracture, additional fractures might be started?

A Yes. Could I elaborate the answer in that hypothetical question?

Q Pardon?

A Additional fractures would be expected to be within the immediate area in the girth of that particular fracture." (Tr 2780)

and

"Q 'While crack arresters have been effective in stopping a great number of fractures, continued experience has demonstrated that vessels can break in two in spite of arresters. In such cases, however, the ships were under such conditions of loading and heavy seas as to make it not unreasonable to expect that, coupled with the loss of strength resulting from the original fracture, additional fractures might be started.' Do you agree with that statement?

A I agree with that, yes." (Tr 2903-2904)

The opinion of the District Court in *The ESSO MANHATTAN*, 121 F Supp 770 (D.C.S.D.N.Y., 1953), 1953 AMC 1152, presents a very informative review of the subject of abnormal stresses exerted on welded steel

and its effect in weakening the structural integrity of welded steel vessels. In this case the court held that the cause of fracture in the *ESSO MANHATTAN* was a structural weakness, consisting of "a defective butt weld in a ship built of notch-sensitive steel operating under climatic conditions which brought the steel below its critical temperature." The court found that the fracture in the *ESSO MANHATTAN* commenced in a defective butt weld at the crown of the deck and it is noteworthy that the 14 foot crack sustained by the SS PENNSYLVANIA in its fatal voyage likewise commenced in a butt weld and extended down 14 feet into the engine room. The fracture in the *ESSO MANHATTAN* occurred in an air temperature of from 30 to 40 degrees and water temperature of 38 degrees, while the Class I fracture sustained by the SS PENNSYLVANIA on Voyage 5 occurred at substantially higher sea and air temperatures.

The Design and Method of Construction of Welded Steel Merchant Vessels (Exh 185) contained detailed reports of the investigation and findings as to the cause of fractures in the ESSO MANHATTAN and the evidence shows that petitioner's Marine Superintendent Vallet was familiar with this publication and had read the same prior to the sailing of the SS PENNSYLVANIA on Voyage 6 (Tr 209).

That the SS PENNSYLVANIA's hull was structurally weak is forceably demonstrated by the events immediately attending her loss, as disclosed by her radio message reporting the 14 foot crack down the port side of the vessel starting in a weld between Frames 93 and 94, and the entrance of water into No. 1 hold.

Less than three months had elapsed between the Class 1 hull fracture sustained on the fatal voyage and the Class 1 casualty which the vessel sustained on her immediately previous Voyage 5. In view of the fact that only 5 Class 1 hull casualties were recorded as of the date of trial of this case for *all* Victory class vessels built in this nation, a Class 1 hull fracture on two successive voyages establishes a sad record for the integrity of the SS PENNSYLVANIA's hull. The record in this case clearly supports the finding of the trial court that the vessel was structurally weak and sensitive to cracking.

Two critical failures in the hull of the SS PENNSYLVANIA on her fatal voyage contributed to her loss. The first casualty reported was the 14 foot crack down the port side between frames 93 and 94, allowing sea water to enter the engine room. The second hull failure is evidenced by the radio dispatch reporting that sea water was entering the No. 1 hold.

Under the authorities above outlined, the foregoing hull failures alone impose upon petitioner the burden of coming forward with an explanation of the cause of the failures and the entrance of sea water, under a statutory exception to liability. See *Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951); *The MEDEA*, 179 F 781 (9th Circ., 1910); *The SS ASTURIAS*, 40 F Supp 168 (D.C.S.D.N.Y., 1941), affirmed 126 F2d 999 (2nd Cir., 1942). No such explanation can be offered by petitioner for either of the foregoing failures.

As to the 14 foot crack on the port side, petitioner's only explanation is to assert, generally, that it was caused by the laboring of the vessel in the storm, which the trial judge has held did not constitute a peril of the sea. (In fact, petitioner's only explanation as to the failures and breakdowns suffered by the SS PENNSYLVANIA in her final moments is the speculative, general and entirely inadequate conjecture that they were all caused by the storm).

The significance of the 14 foot crack which permitted water to enter the engine room and the taking of water in the forward holds becomes apparent when we consider that the PENNSYLVANIA was "a one compartment ship", which means that the vessel could no longer maintain her buoyancy after one hold was full of water.

At pages 100-101 of its brief, petitioner makes the surprising representation that the entrance of water in the engine room, caused by the 14 foot crack in the vessel's hull, was not a factor of unseaworthiness and that this hull fracture and the entry of water into the engine room had no bearing upon the vessel's loss. Consider this assertion in light of the definition of a Class 1 hull fracture as one which weakened the main hull so that the vessel is lost or in a dangerous condition (Tr 1864-1865)! Petitioner further makes the remarkable assertion that ". . . the water entering the engine room never gave any trouble" (petitioner's brief, p 101). The contrary is established by the very ship's radio message reporting this crack and advising that the vessel would turn around as soon as possible and proceed to Seattle.

The dire circumstances of a ship crippled in heavy seas by a Class 1 hull fracture, placing the vessel in imminent danger of further failure (Tr 2770) is obvious. The continued existence of this fracture, coincident with the subsequent entry of water in No. 1 hold, the entry of water through No. 2 hatch and the complete breakdown of the steering systems, has a clear causal relationship to the foundering of the SS PENNSYLVANIA. Certainly the fracture created an immediate and major weakness in the vessel's hull at a

time when all the capacities of a staunch ship were needed.

What was the cause of taking water in No. 1 hold? At pages 108 and 109 of its brief, petitioner admits that it cannot explain the cause stating, "Nor is there in the evidence any information as to *how* or *why* water got into No. 1 hold." Then at page 109, petitioner speculates that the cause was the violence of the seas.

Again petitioner completely fails to appreciate that under both American and Canadian authorities it is obliged to come forward with a specific and adequate explanation for the structural failures of the vessel allowing entry of water in No. 1 hold. It has not carried this burden if the issue is left in doubt. Conjecture will not suffice.

Actually petitioner *cannot* offer an adequate explanation for the hull failures evidenced by the 14 foot crack on the port side and the flooding of No. 1 hold. It *cannot* show that the portions of the vessel sustaining these hull casualties were inspected at all subsequent to the routine annual survey in August, 1951.

In our opening brief we have pointed out that the only inspection given this vessel at the conclusion of Voyage 5 was a routine visual inspection of the underwater portion of the hull. No examination whatsoever

was made of the portion of the hull above water. No examination was made of the main deck of the vessel where numerous fractures had been discovered in the past, primarily at pad eyes. The failure to examine the main deck was particularly negligent in view of the evidence that the 22 foot deck fracture sustained on Voyage 5 opened and closed one-quarter of an inch during the vessel's return to port, which imposed a further strain on the vessel's hull and created further susceptibility to additional fractures (Tr 364; 2780). No examination was made of the interior of the vessel's hull, which at the time of drydocking at the conclusion of Voyage 5 was not even unloaded. Inspecting personnel of the American Bureau of Shipping and the Coast Guard were not advised of the damage sustained on Voyage 5 or given any instruction or information which would guide and determine the extent of their inspection, which was, accordingly limited to a routine visual inspection of the underwater body.

Under the above circumstances petitioner seeks to rely upon statements of various surveyors, representatives of the Coast Guard and the American Bureau of Shipping, and certificates to the effect that the ship was seaworthy, which statements and certificates were the product of earlier surveys. In this case we are, of course, interested only in the seaworthiness of the ves-

sel for its intended voyage at the inception of Voyage 6, considering the season and route to be traversed. We are not interested in certificates and statements made as a result of inspections in prior years. Petitioner apparently fails to appreciate that the seaworthiness of a vessel for a particular voyage is an intrinsic fact. The vessel was seaworthy in all respects for the intended voyage or she was not, and all the pronunciations and certificates in the world will not alter her status. In fact, they do not constitute evidence of her status at the inception of Voyage 6. Any statements made or cerificates issued respecting this vessel between the conclusion of Voyage 5 and the inception of Voyage 6 must be weighed in light of the limited and superficial examination given the ship during this period. Such statements or certificates are, accordingly, to be discounted on the issue as to the seaworthiness of the SS PENNSYLVANIA as well as petitioner's exercise of due diligence. In this respect the following statement in *Compagnie Maritime Francaise v. Meyer*, 248 F 881, at p 885, (9th Cir., 1918) is particularly applicable:

> "In the present case the court below was of the opinion that the testimony of the experts who inspected the vessel before her voyage began was not conclusive; that the inspection was general, largely visual *and not particularly of the parts which proved defective.* The evidence, we think, sustains that conclusion. There is no testimony that any of

the inspectors made other than visual examination, except the witness Le Roy, who testified that he sounded with a hammer the ship's sides, and all accessible rivets, including those of the hull, but *that he could not examine all rivets for the reason that* at that date, August 27, 1907, *there was cargo in the hold.*" (Emphasis supplied).

The lack of significance of formal surveys and certificates under similar circumstances was recognized by the Oregon Federal District Court in *The NINFA*, 156 F 512 (D.C.D. Ore., 1907), where Judge Wolverton stated at p 525:

"I place but slight value on the surveys of the Italian Consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy."

And in *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), at p 492:

"Clearly the duty of the shipowner here is nondelegable . . . While various precautions have some evidentiary value, neither 'visual inspection' . . . nor 'inspection of hull and machinery of the vessel' . . . *nor 'diligence in the acquisition of seaworthiness certificates'* . . . is conclusive as to the fulfillment by the vessel owner of his duty to exercise the requisite care . . . All the testimony, and all

the surrounding facts and circumstances, must be considered." (Emphasis supplied)

See also *The FELTRE*, 30 F2d 62 (9th Cir., 1929), 1929 AMC 279; *RIDEOUT, No. 7*, 53 F2d 322 (9th Cir. 1931), 1931 AMC 1870; *The CYPRIA*, 137 F2d 326 (2nd Cir. 1943).

Under the basic test of seaworthiness enunciated by the United States Supreme Court in *The SILVIA*, 171 US 462, 43 L ed 241, (1898), it is clear that the weakness in the hull of the SS PENNSYLVANIA at the inception of Voyage 6 was such that she was not reasonably fit to carry cargo undertaken to be transported, considering the season and the waters to be traversed.

C. Evidence of a Defective Steering System.

The trial court found that the failure or breakdown of the vessel's steering system in heavy seas was a product of the unseaworthy condition of the steering machinery at the inception of Voyage 6 and that such failure was a proximate cause of the vessel's loss.

The first radio message of the ship reporting the failure of its steering system was originated at 1807 GMT January 9 and appears as follows:

"ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM".

At 1930 GMT January 9 the vessel transmitted a dispatch confirming that the vessel couldn't steer and stating that if the steering gear could not be fixed it would require assistance.

At 2015 GMT January 9 the vessel reported that it was using hand steering and at 0004 GMT January 10 the vessel reported that she had the steering gear fixed but could not steer as the rudder was too far out of the water. Of course, by this time the vessel had taken water in No. 1 hold and No. 2 hold was flooded, both holds being loaded with bulk grain.

The evidence accordingly establishes that on the fifth day out of port the SS PENNSYLVANIA, while proceeding in heavy seas, sustained a critical failure of her steering system. For a period of six hours, and until some twenty-four minutes before the ship was abandoned her main steering engine was not functioning. Under all authorities there is no question that the complete failure of this vital machinery on the fifth day out of port during a critical period in the storm, and when the vessel had suffered a Class 1 hull fracture, gives rise to a presumption that the steering system was defective and unseaworthy at the time the vessel sailed.

Again the burden is cast upon petitioner to come forward with a satisfactory explanation of the cause

of the breakdown under a statutory exception to liability, and to prove the exercise of due diligence in the inspection and repair of the steering equipment. This the petitioner has not done, as the trial judge has held.

In *Metropolitan Coal Co. v. Howard*, 155 F2d 780 (2nd Cir., 1946), Judge Learned Hand stated, at p 783:

> ". . . for courts have recognized over and over again that unfitness developing in a vessel shortly after she breaks ground, is proof enough of unseaworthiness."

See also *The SOUTHWARK*, 191 U.S. 1, 48 L ed 65 (1903).

The breakdown of a vessel's steering system has been the principal issue in a number of leading admiralty decisions and in each case it has been held that the steering failure gave rise to a presumption that the vessel was not seaworthy, imposing upon the shipowner the burden of proving the exercise of due diligence and explaining the cause of the failure under a statutory exception to liability. This rule was stated as follows in *The A. H. F. SEEGER*, 104 F2d 167 (2nd Cir., 1939), where the court stated at p 168:

> ". . . it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. . . In such a case there is ordinarily

fault on the part of the owner in operating a vessel that is not seaworthy and the law casts upon him the burden of showing not only what happened but what was done and what would have been necessary to avert the casualty. The Reichert Line, (2d Cir.) 64 F. 2d 13; Cranberry Creek Coal Co. v. Red Star Towing and Transportation Co. (2d Cir.) 33 F. 2d 272; In Re Reichert Towing Line (2d Cir.) 251 F. 214, 217."

In a recent case, *The IONIAN PIONEER*, 236 F2d 78 (5th Cir., 1956), 1956 AMC 1750, it was found that the vessel stranded as a result of the failure of the steering apparatus. The shipowner was unable to rebut the presumption of unseaworthiness thereby arising and could not show the exercise of due diligence in inspection and repair of the steering machinery. In denying exoneration, the Fifth Circuit stated, at p 80:

"The libelant has never shirked its burden, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, . . . 86 L.Ed. 89, 1941 A.M.C. 1697, of affirmatively establishing a case under the contract of private carriage which warranted at least, due diligence to make the vessel seaworthy, and by reflex, from this and the catch-all exculpatory clause so tenderly embraced by shipowner, imposed liability where the stated exception was not made out. The Zesta, 5 Cir., 212 F.2d 137, 1954 A.M.C. 899; The Framlington Court, 5 Cir., 69 F.2d 300, 1934 A.M.C. 272. It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted loss or damage arising or resulting from (1)

navigational error, (2) stranding or (4) latent defect, (6) any other cause without actual fault or privity, The Folmina, 212 U.S. 354 . . . 53 L.Ed. 546; and certainly not if these were merely concurring causes. *Compania de Navigacion La Flecha v. Brauer*, 168 U.S. 104, 118, . . . 42 L.Ed. 398; The Olga S., 5 Cir., 25 F.2d 229, 1928 A.M.C. 831.

"In this task, while ultimate risk of non-persuasion may have been on the cargo, it had the usual advantages of a bailor putting on the carrier, as the person having the means of knowledge, the obligation of coming forward with some explanation, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, supra; The Northern Belle, 9 Wall 526, 76 U.S. 526, 19 L.Ed 746, 748; *Southern Ry. Co. v. Prescott*, 240 U.S. 632 . . . 60 L.Ed. 836, and a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. The Southwark, 191 U.S. 1, . . . 48 L.Ed. 65; The Olancho, D.C.S.D.N.Y., 115 F. Supp. 107, 1953 A.M.C. 1040; The Agwimoon, D.C.Md., 24 F.2d 864, 1928 A.M.C. 645, affirmed 4 Cir., *Atlantic Gulf & West Indies Steamship Lines v. Interocean Oil Company*, 31 F.2d 1006, 1929 A.M.C. 570."

The following comments of the court in *The IONIAN PIONEER*, supra, 236 F2d 78, 83, on the shipowner's failure to exercise due diligence in inspection and repair of the steering machinery have particular application to the instant case:

> ". . . Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of seaworthiness from Helenic or Lloyds classification societies and which is certainly not the test, see *KNAUTH*, supra, page 187; *Abbazia* (S.D.N.Y.), 127 Fed. 495; *Poleric* (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; *Edgar F. Coney*, (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, the *record is completely silent of any serious inspection and survey of the entire steering machinery before this charter party voyage began.*" (Emphasis supplied)

Petitioner's complete failure to show the exercise of due diligence in inspection and care of the vital steering machinery of the SS PENNSYLVANIA corresponds to *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1946) 1946 AMC 178, where a collision resulted when the steering gear of the *BEDFORD* jammed. The owner of the *BEDFORD could not establish* the exercise of due diligence by showing *a routine operating test* of the steering gear just before the voyage in question commenced, or by the production of surveyors' certificates, one certificate as to the steering gear and its connections having been issued just three months before the vessel sailed. In holding the owner of the *BEDFORD* liable the court stated, a p 209:

"In addition to the survey by Lloyd's in January, 1940 (referred to above) there is a Lloyd's report dated July 20, 1941, of a survey and another report dated February 28, 1942, of one made on January 7, 1942, in both of which the 'steering gear and its connections' were reported 'Good.' However, MacCorkindale, Lloyd's representative who made the last two surveys, testified that no megger test nor electrical equipment examination was made on either of these surveys. Lloyd's inspections in 1941 and 1942 apparently were not full surveys, for although reports state the steering gear was examined, no electrical equipment was tested. In any event certificates of surveyors and inspectors are to be valued in the light of the actual facts disclosed. *The Doris Kellogg*, 1937 A.M.C. 254, 18 F. Supp. 159.

. . .

"According to the *Bedford's* deck log and the testimony of her Third Officer, a routine operating test of the steering gear was made on the morning of April 9, before sailing from the Bayonne and it was reported 'in good order.' The test consisted of repeatedly turning the wheel and watching the indicator."

As we have pointed out in our opening brief (pages 32 through 39), petitioner has failed to introduce any evidence of inspection and repair of the steering system which even approach the standard of due diligence laid down by the foregoing decisions. The last inspection of the steering system of the vessel was in August, 1951 and this was confined strictly to an ex-

ternal examination of the steering parts and the very "*routine operating test*" held inadequate by the court in *The MEANTICUT-BEDFORD*, supra.

The hydraulic pumps were not opened up and internal parts of the steering system were not inspected in the August, 1951 survey. In fact the record is barren of any evidence that such an examination of the steering system of the SS PENNSYLVANIA was ever made by petitioner. Petitioner would excuse its neglect of this vital equipment by asserting that the proof of its seaworthiness is that it had worked all right in the past (petitioner's brief, p 104).

There is likewise no satisfactory evidence of inspection or test of the emergency or hand steering gear. The August, 1951 survey does not disclose even an operating test of this equipment and as discussed in our opening brief the emergency steering system was found to be jammed by shifting cargo when the vessel was in Portland, Oregon during Voyage 5. Petitioner's Marine Superintendent, Vallet, gave this difficulty his personal attention but took no measures to prevent a subsequent jamming if the cargo should shift again.

In discussing the failure of the steering gear (petitioner's brief, pp 102 through 108), petitioner presents a bizarre interpretation of the radio traffic relating to

the breakdown of this equipment. He quotes the following radiogram:

> "091730Z GMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM."

From the dispatch above quoted, petitioner advances its conclusion that the vessel did, in fact, turn completely around, which has no satisfactory foundation in evidence. In the above quoted dispatch the Master merely reported, in effect, that he would endeavor to steer 110° but in the same dispatch he states without qualification that he could not steer at all. The fact that he could not steer at all is then confirmed categorically by the subsequent radiogram, as follows:

> 1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CAN NOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE VERY HIGH SEAS CAN NOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CAN NOT GET ON DECK TO SECURE MASTER.

The astounding feature in petitioner's treatment of the vessel's steering failure is its assertion (petitioner's brief, p 103) that the "undefined trouble with the steer-

ing gear" was "not very serious". If it wasn't very serious the prevailing weather and sea conditions were certainly not of the violence petitioner represents them to be. The radio messages of the vessel establish without question that the vessel could not steer and that her steering system failed completely during a critical period in the storm. This complete loss of steerageway would have placed the SS PENNSYLVANIA in a very serious situation in any combination of heavy seas and weather. It is also very obvious that any failure or trouble whatsoever with the steering system of a ship during a storm in the North Pacific is of dire consequence. In the case of the SS PENNSYLVANIA the steering failure prevented her from maintaining any steerageway and left her at the mercy of the waves with a Class 1 hull fracture on the port side, with water pouring through her No. 2 hatch and flooding her No. 1 hold, and with cargo drifting about her forward deck.

What was the cause of the failure of the steering system? Petitioner appears quite confused as to the law on this point for it asserts (petitioner's brief, p 108) that cargo claimants must point out the specific unseaworthy feature of this gear. Petitioner forgets that the cargo claimants had no opportunity to inspect this gear and certainly did not govern or control the degree

of examination, repair and replacement which due diligence required of the shipowner under the circumstances. The rule is of course to the contrary, under all authorities reviewed above, and as stated in *The A.H.F. SEEGER*, 104 F2d 167 (2nd Cir., 1939), 1939 AMC 792, the burden is cast upon the shipowner "of showing not only what happened but what was done and what would have been necessary to avert the casualty". This petitioner has not done and if it is content to rely upon the superficial, inadequate inspections which the record in this case discloses, petitioner assumes the responsibility for such defects as may exist and which a diligent examination would reveal. *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F2d 194 (D.C.S.D.N.Y., 1927).

D. Evidence of the Unseaworthy Condition of the Forward Hatches, the Insecure Carriage and Stowage of Forward Deck Cargo.

The trial court found that deck cargo on the forward deck came adrift, taking off tarpaulins on the forward hatches, and that No. 2 hatch was open and full of water. These events were found to be factors of unseaworthiness contributing to the vessel's loss and the product of the unseaworthy condition of the forward hatches and stowage of cargo on the forward deck.

In our opening brief (pp 50 through 58) we have discussed the evidence demonstrating petitioner's privity in connection with the unseaworthy carriage of cargo on the forward deck and the insecure battening of the forward hatches. We shall now review this evidence as it supports the court's finding that this condition was a factor of unseaworthiness existing at the inception of the voyage which contributed to the loss of the vessel and petitioner's lack of due diligence in respect thereto.

In considering the unseaworthiness of the carriage and stowage of deck cargo on this vessel, the test of seaworthiness laid down by *The SILVIA*, 171 US 462, 43 L ed 241 (1898), must at all times be borne in mind, viz., was the SS PENNSYLVANIA reasonably fit to carry the cargo she undertook to transport? In *The INDIEN*, 5 F Supp 349; affirmed 71 F2d 752 (9th Cir., 1934), this court has recognized that the improper stowage of articles which will imperil the safety of a ship if they come loose, renders a vessel unseaworthy.

We have pointed out in our opening brief that the vessel was carrying a cargo of bulk grain in her lower holds and that such cargo is considered a dangerous cargo requiring the utmost safeguards for security of the hatches. Despite the necessity for extreme precaution in preserving the security of the hatches, petitioner

tendered to the U. S. Army the vessel's entire deck space for carriage of cargo on Voyage 6. On the basis of the space tendered, the Army prestowage plan prepared by Paul C. Maurice, Marine Superintendent for the Seattle Port of Embarkation, provided that a white label cargo of corrosive acid, in 5 gallon glass carboys, was to be stowed one level high in the wings of No. 5 hatch and that a red label cargo of acetylene cylinders should be stowed below deck (Tr 2120-2121; 2128-2134). The acid carboys were placed by the Army for stowage one level high to keep them below the bull rail for support (Tr 2128-2132).

In spite of the Army prestowage plan, the Master intervened during the course of loading and directed that the corrosive acid cargo should be stowed alongside No. 2 hatch (Tr 2686-2687) and that the acetylene cylinders should also be stowed on the forward deck (Tr 991; 1095-1096). The 5 gallon glass carboys of acid were stowed two tiers high by No. 2 hatch (Tr 1004) although the Army prestowage plan provided that these acid carboys should be stowed only one level high in the wings of No. 5 hatch (Tr 2128). The action of the Master in ordering the stowage of white and red label cargo on the forward deck contrary to the Army prestowage plan, was made with the knowledge and acquiescence of petitioner's regularly em-

ployed shore-based supercargo who was in attendance at the loading of the vessel and in charge of the loading for petitioner (Tr 1155-1156). The stowage of the white and red label cargo on the forward deck was made well in advance of the SS PENNSYLVANIA's departure on Voyage 6 and was reported to petitioner's Seattle office by its regularly employed supercargo (Tr 1166-1167).

In addition to the aforementioned acid and acetylene cargo the forward deck of the SS PENNSYLVANIA was loaded with 26 two-wheel trailers (Exh 188), stowed on the starboard side by No. 3 hatch (Tr 1005).

Petitioner seeks to minimize the total weight of the deck cargo carried on the forward deck of the SS PENNSYLVANIA. It is not the weight of the deck cargo which is an important factor in this case. The tragic consequences of the ill advised stowage of any cargo on the forward deck of this vessel, considering the intended route and season, the nature of the deck cargo (acid carboys and acetylene cylinders), with the lower holds filled with bulk grain, is graphically revealed by one of the ship's radiograms:

> ". . . VERY HIGH SEAS CANNOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CANNOT GET ON DECK TO SECURE MASTER."

Petitioner was fully aware that on any voyage in the North Pacific it was a common experience to take heavy seas over the bow and sides of the vessel, with decks continuously awash. Repeated notation of such conditions appears in the logs of the SS PENNSYLVANIA for its Voyages 1 through 5, inclusive (Exhs 40 through 44). In fact, petitioner's Assistant Port Engineer, Mr. Brenneke, testified that he has seen water cataract over the top of the forecastle deck two feet thick (Tr 330).

Petitioner's witness, Captain Brown of the CYGNET III, testified:

> "A You can't send men out on deck when the vessel is shipping heavy seas over the decks.
>
> Q Is that what you mean by the decks being awash?
>
> A Yes." (Tr 1658)

Petitioner's complete awareness of the danger associated with carriage of deck cargo, particularly on a voyage in the North Pacific during the winter time, is emphasized by the following experiences aboard the SS PENNSYLVANIA herself in prior voyages:

On Voyage 1 a spare propeller stowed on deck was lost overboard in a storm (Tr 159);

On Voyage 2, waves over the bow broke off a reel spring wire which rolled back of No. 2 hatch cutting four tarps on No. 2 hatch about one foot in length through the pontoon. Vallet testified that this was ordinary heavy weather damage which happens on "practically all the voyages" (Tr 189);

On Voyage 4, seas over the starboard after deck tore an acid cargo box adrift, damaging the forward starboard No. 4 boomrest and cargo shifted. Vallet testified that this was an "ordinary routine instance that happens on any transpacific voyage" (Tr 190);

On Voyage 5, decks were awash and the deck load fore and aft shifted. Vallet testified that this was not an "untoward incident" but "just a vessel going through a regular storm which happens practically on all voyages" (Tr 190-191).

Petitioner's witness, Captain Richard A. Johnson, cargo surveyor, testified that it was not at all unusual to take heavy seas, or green seas, over the foredeck stating, "That is certainly to be expected on any ocean-going voyage or any time of the year." (Tr 1217). He also testified that it would be more dangerous for a vessel to sail with a deck load than without a deck load (Tr 1750) and that a drifting deck load is dangerous (Tr 1751).

The unseaworthy stowage of cargo on the forward deck for the intended route and season is enhanced by the testimony of petitioner's witness, Samson Kamel,

concerning the method of securing the label cargo boxes. Mr. Kamel testified:

> "Q Do you anticipate that there will be some working of the cargo and it will be necessary to keep those turnbuckles tightened or to tighten them up? You are nodding your head up and down. I take it you mean to answer, Mr. Kamel?
>
> A Yes, I am sorry.
>
> Q You anticipate, then, when you get everything set up as tight as you can that the turnbuckle will be about—and separated as much as you can so that you can take it up?
>
> A That is right.
>
> Q You assume by that that the seamen will, during the course of the voyage, *at all times* will be able to go forward and to keep the turnbuckles tight? (Emphasis supplied)
>
> A Yes, sir." (Tr 1224-1225)

From Kamel's testimony it is obvious that the very security of the cargo lashings was predicated upon the assumption that the crew *at all times* could go forward on the deck and keep the turnbuckles tight. The absurdity of this assumption is revealed by the events which occurred during the last hours of the SS PENNSYLVANIA.

To climax the unseaworthy conditions prevailing on the forward deck of the SS PENNSYLVANIA at

the inception of Voyage 6, the record affirmatively establishes that the locking bars or cross battens on the forward hatches of the vessel were in a defective condition immediately prior to the time the vessel sailed. (The cross battens are a securing device designed to hold the tarpaulins on the forward hatches). Three members of the vessel's crew who served on Voyage 5 testified, without contradiction on the record, that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secure at sea. See testimony of Alvin Huston, ship's carpenter (Tr 2081-2082), Richard S. Brooks (Tr 2094) and Royce Cornwell (Tr 2100).

Petitioner can point to no evidence, following the conclusion of Voyage 5 and prior to Voyage 6, that the defective cross battens were ever repaired or replaced by new equipment and there is no evidence that the cross battens were inspected during this period. In a rebuttal effort petitioner refers to testimony of supercargo Allinson, surveyor A. B. Johnson, and "Captain" Sheldrup. However, Allinson did not make an inspection and did not even know whether the hatches were securely battened (Tr 1102-1103). A. B. Johnson could not state that the cross battens were set up tight since that "would just not be my job" (Tr 1208-1209). Mr.

Sheldrup testified that the security of the hatches was not his concern, that he made no inspection of the hatches or hatch covers and was not even sure the tarpaulins were set up tight when he left the ship (Tr 2702).

Based upon the evidence reviewed above concerning the stowage of the forward deck cargo, the insecure lashings and defective cross battens, we have the testimony of Mr. John D. Gilmour an experienced marine surveyor (Tr 2301) corroborated by the testimony of two experienced master mariners, Captain Harry Johnson (Tr 2433-2434) and Captain Ulstad (Tr 2220) that the SS PENNSYLVANIA was not seaworthy when she sailed for Voyage 6 in January across the North Pacific.

We must take exception to the derisive reference by petitioner to the three crew members who served on Voyage 5 and whose testimony brought to light the defective condition of the cross battens on the forward hatches. See the reference on page 119 of petitioner's brief to "a cab driver . . . , a car salesman . . . and an old ship's carpenter." The record shows that Mr. Huston, who was not an elderly man, served honorably with the United States Navy for 16 years and at the time of his honorable discharge was a chief carpenter. As to the other seamen, Brooks and Cornwell, petitioner is aware that seamen have various occupa-

tions when not serving at sea. While serving aboard the SS PENNSYLVANIA on Voyage 5, these particular men were duly certified by the U. S. Coast Guard as competent to perform their duties and under such certification were employed by petitioner. Furthermore, as members of the crew these seamen actually worked with the storm battens throughout Voyage 5 and experienced the problems and difficulties to which they testified. The definite relevance of their testimony in this respect lies in the complete absence of any evidence that the defective cross battens were repaired, replaced or even inspected following the conclusion of Voyage 5 and the inception of Voyage 6.

The record in this case abundantly supports the findings of the trial court as to the unseaworthy condition of the forward hatches and the unseaworthy stowage of deck cargo for the Great Circle Route in the North Pacific during January.

This phase of the unseaworthiness of the SS PENNSYLVANIA is particularly outlined by the decision of the Second Circuit in *The WEST KEBAR*, 147 F2d 363 (2nd Cir., 1945), 1945 AMC 191, which involved the unseaworthy stowage of certain deck cargo, including empty ammonia cylinders. The ammonia cylinders, stowed on the after deck of the vessel, broke loose in a "whole gale" in the Atlantic with seas over the deck.

The drifting ammonia cylinders broke off a number of "kick tubes" which created openings in the deck through which sea water entered into No. 4 and No. 5 holds, damaging cargo. In holding that the vessel was unseaworthy as to her deck cargo, in view of the intended voyage, season and route, and in denying the defense of a peril of the sea, Judge Learned Hand stated at pp. 365-366:

> "The first question is whether the ship was unseaworthy. Arguendo, we will assume that the 'kick tubes' did not make her so if she had carried no deck cargo; and, perhaps also, even when she carried certain kinds of deck cargo. Indeed, we might go still further, and assume that she was seaworthy, just as she rode, for a summer voyage, for example in the Mediterranean. But she was to cross the Atlantic in January, ending in latitudes over 40°; and the question is whether, with the deck cargo she actually did carry and the 'kick tubes' in her deck, she was reasonably fitted for such a voyage. The Silvia, 171 U.S. 462, 464; The Southwark, 191 U.S. 1, 9; Societa Anonima, etc. v. Federal Insurance Co., 1933 A.M.C. 323, 62 F. (2d) 769, 771 (2CCA); The Smyrna, 1933 A.M.C. 231, 63 F. (2d) 1048, 1050 (4CCA); The J. L. Luckenbach, 1933 A.M.C. 980, 65 F. (2d) 570, 572 (2CCA); The Galileo, 1932 A.M.C. 1, 54 F. (2d) 913, 914 (2CCA). The fact that the 'kick tubes' had caused no trouble in the past was relevant, but far from conclusive; it took only a minimum of foresight to perceive that they would stand up against very little violence. True, as they were placed on the deck, they were out of the way; set either close to the bulkhead, alongside the hatch coamings, or around the mast. It would take a direct hit to break

them off; but it would not take a heavy hit, and each one, if broken would open a hole over an inch in diameter directly into the 'tween deck. An ammonia cylinder, weighing 200 pounds, free to plunge about on an open deck in a heavy seaway, was an engine before which such a fragile obstacle was no better than an eggshell. *The safety of the cargo stowed below deck* was, therefore absolutely dependent upon the continued solidity of the pack; and, in the way the cylinders were made fast, that solidity depended upon each one's keeping its position in the pyramidal stack. As soon as one slipped out from between its fellows, the hold of the rest upon each other was lost, and all would inevitably escape. There were the nets, to be sure, but these did not go clear to the deck, and could not be expected to hold if they had, once the pack broke up. (Emphasis supplied)

. . .

"*The consequences of any such break being so great, the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and 'catastrophic' storms; and such care the ship did not in fact bestow as the* event proved. (Emphasis supplied)

. . .

"The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season. We cannot therefore agree that 'the damage to the cargo in the shelter or bridge decks, and the No. 5 'tween-deck and No. 5 lower hold was due to perils of the sea,' as the judge found. On the contrary, we are forced to conclude that the

West Kebar is liable for entry of all sea water that she shipped on the after well deck."

III

Petitioner's Defense of Latent Defects.

In the petition for exoneration from or limitation of liability, by which this proceeding was commenced, no assertion or allegation is made that the vessel was lost by reason of latent defects. Nothing relating to the subject of latent defects appears in the findings of fact and conclusions of law which are before this Court on this appeal.

For the first time in this entire proceeding, and apparently in a desperate effort to seek some statutory defense of liability, petitioner asserts the doctrine of latent defect. Petitioner did not assert this defense at the time of trial and the record contains absolutely no evidence on the subject of a latent defect. Nevertheless, petitioner now suggests that a latent defect was responsible for the hull failures (petitioner's brief, pp 124-129) and the failure of the steering gear on Voyage 6 (petitioner's brief, p 137). At the same time, petitioner states that it doesn't know what these latent defects were, and again vaguely attributes the failures to the storm.

The authorities on the subject of latent defects decisively eliminate this statutory defense to liability in the instant case. The defense of latent defects, and a shipowner's burden in respect thereto, is given thorough consideration by the Fifth Circuit in *Waterman S. S. Corp. v. United States S. R. & M. Co.*, 155 F2d 687, 691 (5th Cir., 1946), where the deck cargo on a vessel came adrift when two "pelican hooks", which secured chain lashings, bent in such a fashion as to release the lashings. The Carriage of Goods By Sea Act of 1936 was involved and the shipowner urged that a latent defect existed in the pelican hooks, although it was unable to produce the hooks in evidence for examination by a competent witness. In denying the defense of latent defect the following comments of the court are particularly applicable to the instant case:

> "Upon the carrier is placed the burden of going forward to show a peril of the sea or a latent defect; it also has the risk of non-persuasion.
>
> " '. . . The reason for the rule is apparent. He is a bailee intrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain

or, explaining, bring within the exceptional case in which he is relieved from liability . . .'

"A true latent defect is a flaw in the metal and is not caused by the use of the metallic object. 'A latent defect is one that could not be discovered by any known and customary test.'

. . .

"The record discloses no evidence on the subject of a latent defect. The carrier merely argues, 'A reasonable explanation of the cause of the straightening out of the pelican hooks is that a latent defect existed in them.'

. . .

"The carrier did not introduce the pelican hooks into evidence. The carrier offers as its excuse for this failure that the Government requisitioned the ship before the shipper brought this suit. Since this is a plausible excuse for not producing the hooks in court, the court will not draw the inference that an examination of the hooks would show a latent defect. The consequences of its inability to produce the hooks in court, however, must fall upon the carrier, for without the hooks and without testimony by a competent witness on the latent defect the carrier cannot satisfy its burden of proving the existence of latent defects.

. . .

"Where it is doubtful whether either a latent defect or a peril of the sea exists, even in the absence of proof of any negligence, the carrier has not carried its burden of proof."

It will be recalled that in *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1946), 1946 AMC

178, the shipowner raised the defense of latent defects to excuse the failure of the vessel's steering system. The shipowner could not show the precise cause of the failure and in rejecting this defense the court stated, at p 206:

> "The real issue is presented by Bedford's defense of inevitable accident—a latent defect. Relying on this defense the claimant must prove it if it is to be relieved of liability. The claimant must either point out the precise cause and show that it was in no way negligent, or must show all possible causes, and that it is not at fault in connection with any one of them. In *re Reichert Towing Line*, 2 Cir., 251 F 214, certiorari denied 248 U.S. 565, 39 S.Ct. 9, 63 L.Ed. 424; *The Moran, D. C.*, 12 F. Supp. 493."

The rule was recognized by this court in *The FELTRE*, 30 F2d 62 (9th Cir., 1929), where the court stated at p 64:

> "The only suggestion of latent defects is found in . . . conjectures . . . conjectures will not be permitted to take the place of proof."

See also: *The FOLMINA*, 212 US 354, 53 L ed 546 (1909);

The IONIAN PIONEER, 236 F2d 78 (5th Cir., 1956) 1956 AMC 1750.

In the instant case, the SS PENNSYLVANIA has been lost and it is clear that petitioner cannot establish

the actual condition of any of the parts of the ship which are known to have failed. In fact, petitioner admits that it does not know what went wrong (petitioner's brief, pp 109; 136).

Furthermore, as the trial court has held, petitioner has not satisfied its burden of proving due diligence in inspection and repair of the parts which failed. Under the circumstances, any defense of latent defect is mere conjecture and must be resolved against petitioner.

IV

Petitioner's Defense of Error in Navigation.

We cannot overlook petitioner's suggestion on page 82 of its brief that an error in navigation may be available to it as a statutory exception to liability. Here again petitioner raises a defense which was not pleaded in the petition and no evidence whatsoever was introduced on this point.

In its conjecture that the SS PENNSYLVANIA turned around in the storm, petitioner intimates that the act of turning around was "an act, neglect or default of the Master . . . in the navigation or management of the ship." It is then vaguely implied by petitioner that the act of turning around may in some way be associated with the breakdowns and failures sustained by the

SS PENNSYLVANIA which caused her loss. We know, of course, that the vessel suffered her Class 1 hull fracture on the port side before the Master even indicated that he had in mind turning around. However, the real weakness in petitioner's assertion lies in the fact that there is no satisfactory evidence that the ship turned around or that if she had turned around, or endeavored to turn around, it would have been an error in navigation or an act of the Master associated with any of the failures and breakdowns which caused her loss. Moreover, we do know that other ships in the immediate storm area did turn around and participate in the rescue-search operations through the full period of the storm without sustaining any serious damage.

The authorities we have previously cited readily dispose of the above defense.

V

The Privity of Petitioner in the Failure to Exercise Due Diligence is Clearly Demonstrated and Proved by the Testimony of Record.

The trial court has not only found that petitioner failed to produce evidence that it used due diligence to make the vessel seaworthy, but that the petitioner did not in fact use such due diligence. See Finding No. VI.

It must at all times be borne in mind that petitioner's duty to exercise due diligence is not delegable. As stated

in *The OLANCHO*, 115 F Supp 107 (D.C.S.D.N.Y., 1953) at p 115:

"The duty imposed on a ship owner to exercise due diligence to make his vessel seaworthy before the vessel breaks ground is non-delegable. If the surveyors or the employees in the shipyard failed to exercise due diligence the shipowner is chargeable therewith. *Navigazione Libera Triestina v. Garcia & Maggini Co.*, 9 Cir., 30 F.2d 62 at page 64. The shipowner has the burden of proving under the Carriage of Goods by Sea Act, that he has performed that duty. T. 46 U.S.C.A. § 1304(1). What constitutes due diligence depends upon the facts and circumstances of the particular case."

See also:

The IONIAN PIONEER, 236 F2d 78 (5th Cir., 1956), 1956 AMC 1750, at p 84:

"The failure on the part of any of the owner's servants, which includes the ship's Master, to take the prudent steps satisfying the non-delegable standard of due diligence is chargeable to it for, 'a shipowner does not exercise due diligence . . . by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy; and that . . . means due diligence on the part of all the owner's servants in the use of the equipment, *before the commencement of the voyage and until it is actually commenced*.' International Navigiation Co. v. Farr & Bailey Mfg. Co., 181 U.S. 218, 225, 21 S.Ct. 591, 593, 45 L. Ed. 830, 833. 'In other words, the owners must show that

those whom they employ to act actually used due diligence'." (Emphasis supplied)

The diligence required is diligence with respect to the vessel itself and not in obtaining certificates.

See:

The OTHO, 49 F Supp 945 (D.C.S.D.N.Y., 1943), affirmed 139 F2d 748 (2nd Cir., 1944);

The FELTRE, 30 F2d 62 (9th Cir., 1929);

The NINFA, 156 F 512 (D.C.D.Ore., 1907);

Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co., 189 F2d 488 (4th Cir., 1951).

It is also well established that a superficial or visual inspection does not satisfy the requirements of due diligence as stated in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH et al*, 109 F Supp 781 at p 793 (D.C.S.D.N.Y., 1951):

> "The carrier does not show due diligence in the inspection to ascertain the vessel's seaworthiness, unless the inspection is something more than visual. . . . Valves should be tested under pressure, not just looked at when not under pressure."

See also:

Ore Steamship Corporation v. DS/AS HASSEL, 137 F2d 326, at p 329, (2nd Cir., 1943):

"A mere superficial inspection of a ship is insufficient to establish an exercise of due diligence on the part of the owner to make her seaworthy."

The VIZCAYA, 63 F Supp 898, at p 904 (D.C.E.D. Pa., 1945):

"As to the exercise of due diligence, the only evidence is that the chief engineer 'inspected' the machinery and found everything fit. But this is insufficient, for I feel that information as to the care and extent of the inspection is of vital importance. Thus, it has been held that a visual inspection is 'inadequate' . . . In any event, if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner."

Warner Sugar Refining Co. v. Munson S. S. Line, 23 F2d 194, at p 197, (D.C.S.D.N.Y., 1927):

"If a vessel owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo on board, instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal."

The standard imposed upon the carrier is the exercise of due diligence in inspection prior to and with respect to the voyage in question, as distinguished from prior inspections and surveys. This rule was emphasized

in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH et al*, 109 F Supp 781 (D.C.S.D.N.Y., 1951) where the court stated at p 792:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Some thing might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

The burden of the carrier to prove the exercise of due diligence is such that it is not carried if the issue is left in doubt.

See:

The INDIEN, 5 F Supp 349; affirmed 71 F2d 752 (9th Cir., 1934);

Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co., 189 F2d 488 (4th Cir., 1951).

Standard Oil Co. (N.J.) v. Anglo-Mexican Petroleum Corp., 112 F Supp 630 (D.C.S.D.N.Y., 1953);

Commercial Molasses Corporation v. New York Tank Barge Corporation, 314 US 104, 86 L ed 89 (1941);

The W. H. DAVIS, 56 F Supp 564 (D.C.S.D.N.Y., 1944), at p 567:

> "The burden of proof of seaworthiness rests upon the shipowner who is a common carrier not because

he is an ordinary bailee but because he is a special type of bailee who has assumed the obligation of an insurer. The burden rests upon him to show that the loss was due to an excepted cause which the law itself annexes to his undertaking and that he has exercised due care to avoid it.

"Such a carrier can only relieve himself of liability by proof of certain permitted exceptions and not to his breach of duty to furnish a seaworthy vessel. In that case since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception."

In our opening brief, we have pointed out the complete lack of evidence sustaining petitioner's burden to prove that it was not in privity with the unseaworthiness of the SS PENNSYLVANIA at the inception of Voyage 6, as well as the evidence supporting the trial court's finding that petitioner failed to exercise due diligence. In our opening brief we have also dealt at length with the evidence establishing that the very failure to exercise due diligence, as found by the trial court, was the personal neglect and default of petitioner's Marine Superintendent, Vallet, his Assistant Port Engineer and other supervisory personnel of petitioner who were invested with high responsibility in the company's management and operations. In fact, most of the failures to exercise due diligence were the result of the Marine Superintendent's personal neglect, default and indifference. It is well established that

under these circumstances the corporate shipowner is not entitled to limitation of liability. This rule has been recognized by the United States Supreme Court in *Coryell v. Phipps*, 317 US 406, 87 L ed 363, 1943 AMC 18, where the court stated with regard to corporate shipowners at 87 L ed 367:

> "In those cases it is held that liability may not be limited under the statute where the negligence is that *of an executive officer, manager or superintendent* whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. Spencer Kellogg & Sons v. Hicks, 285 US 502, 76 L ed 903, 52 S Ct 450, and cases cited; 3 Benedict, Admiralty, 6th ed § 490." (Emphasis supplied)

See also *The POCONE*, 159 F2d 661 (2nd Cir., 1947), 1947 AMC 306, where a subordinate traffic manager had been delegated the duty of the general agent in supervision of the condition of the company ships and repairs they might need. His neglect was held to be the neglect of the corporation which defeated limitation of liability; *The CLEVECO*, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944), affirmed 154 F2d 605 (6th Cir., 1946).

The evidence in this record establishes that the failure to exercise due diligence was the neglect of petitioner's Marine Superintendent and other supervisory personnel, "whose scope of authority included supervi-

sion over the phase of the business out of which the loss . . . occurred." *Coryell v. Phipps*, supra. It is therefore abundantly clear that the trial court erred in finding and concluding that petitioner is entitled to limitation of liability. Moreover, as in the case of the exercise of due diligence, the decided burden of proving lack of privity or knowledge was upon the petitioning shipowner. It is not the responsibility of these cargo claimants to prove knowledge or means of knowledge on the part of the shipowner. See *The SILVER PALM*, 94 F2d 776 (9th Cir., 1937), 1937 AMC 1462; *The CLEVECO*, supra.

We have pointed out in our opening brief at pages 20 through 24 that petitioner at trial did not even undertake to sustain its burden of proof upon the issue of privity but rather relied upon an asserted lack of liability. The record is, accordingly, barren of any satisfactory evidence supporting petitioner's lack of privity and the trial court clearly erred in holding that petitioner has sustained its burden of proof in this regard.

It is significant that petitioner has practically ignored the extensive testimony of its first and principal witness, Marine Superintendent Lester E. Vallet (Tr 138-316), as well as that of its Assistant Port Engineer, Harve R. Brenneke. Only casual, infrequent and brief mention is made of the testimony of these two witnesses

in petitioner's opening brief. The reason is manifest, for the testimony of these two witnesses alone served to highlight their own omissions and neglect, the petitioner's lack of due diligence and accordingly defeat petitioner's right to limitation of liability.

CONCLUSION

In the concluding portions of its brief, petitioner refers to a background, in the enactment of the Carriage of Goods by Sea Act of 1936, of public policy in encouraging shipbuilding interests in the development and maintenance of a merchant marine. Petitioner therefore suggests (petitioner's brief, p 139) that in the instant case it should receive a liberal construction of the statute, which it asserts "replaced" the "old" Harter Act, 46 USCA, § 190, et seq.

This court is aware, and petitioner should be aware, of the fact that the Harter Act of 1893 is still in existence. In the most recent edition of Knauth on Ocean Bills of Lading—the American and Canadian Law (4th Ed. 1953), it was stated at p 163:

> "The Harter Act of 1893 has *not been repealed nor amended* . . . It continues in full force and effect, as heretofore in all relations except the two following:
>
> 1. Foreign commerce in cargo (other than livestock) carried under deck from tackle to tackle;

2. Domestic commerce at the option of the carrier provided the bill of lading contains an express statement that it shall be subject to the Act of 1936."

Each statute in the field of its application provides statutory modification of the very strict common law rule as to the liability of a common carrier, and as stated by the United States Supreme Court in *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 314 US 104, 109, 86 L ed 89, 94 (1941):

> "One who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of the loss was within one of the *narrowly restricted* exceptions which the law annexes to his undertaking, or for which it permits him to stipulate." (Emphasis supplied)

This rule in Admiralty requiring strict construction of statutory exceptions to liability was explained by Judge Learned Hand as follows:

> ". . . the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized." *Metropolitan Coal Co. v. Howard*, 155 F2d 780, at p 783-784, (2nd Cir., 1946).

We submit that under the United States Carriage of Goods by Sea Act and its Canadian counterpart the rec-

ord in this proceeding presents abundant support for the findings of the trial court under which the petition for exoneration of liability was denied.

We further submit, however, that the same findings necessitated a further finding by the trial court that the unseaworthy condition of the SS PENNSYLVANIA at the inception of Voyage 6 was within the privity and knowledge of the petitioner and a conclusion that the petition for limitation of liability should likewise be denied.

The position of the parties in this case is eloquently expressed by the language of this court in a 1931 decision dealing with a similar question:

> "From ancient times the men who have had to go down to the sea in ships have held themselves to high accountability for care in making their craft fit to cope with the capricious elements. Though, as we have seen, the shipowner's liability has been limited by statute, such limitation in his favor is to be strictly construed against him, if he fails to prove his own diligence in making the vessel seaworthy." *Rideout No. 7*, 53 F2d 322, at p 326, (9th Cir., 1931), 1931 AMC 1870, 1877.

Because of the clear evidence showing privity and knowledge of the petitioner in the unseaworthiness of the SS PENNSYLVANIA at the inception of Voyage 6, we submit that the Interlocutory Decree of the trial

court, as it grants the petition for limitation of liability, should be reversed and that a Decree should be entered against petitioner in favor of these cargo claimants for the full amount of their losses, without limitation as to petitioner's liability.

Respectfully submitted,

Koerner, Young, McColloch & Dezendorf
John Gordon Gearin
George B. Campbell

Proctors for Appellants Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company

Summers, Bucey & Howard
Charles B. Howard

Proctors for Appellant The Dominion of Canada.

No. 15131

United States
COURT OF APPEALS
for the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

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THE DOMINION OF CANADA, *Appellant,*

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STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees.*

REPLY BRIEF OF APPELLANT-PETITIONER STATES STEAMSHIP COMPANY REPLYING TO THE ANSWERING BRIEF OF APPELLEES ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA, HEREINAFTER REFERRED TO AS THE INSURANCE BRIEF

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
LOFTON L. TATUM,
1310 Yeon Building,
Portland, Oregon;
BOGLE, BOGLE & GATES,
STANLEY B. LONG,
C. CALVERT KNUDSEN,
Central Building,
Seattle, Washington,
Proctors for Petitioner-Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-57

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STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

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UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

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REPLY BRIEF OF APPELLANT-PETITIONER STATES STEAMSHIP COMPANY REPLYING TO THE ANSWERING BRIEF OF APPELLEES ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA, HEREINAFTER REFERRED TO AS THE INSURANCE BRIEF

Appeal from the United States District Court for the District of Oregon.

To the Honorable Judges of the above entitled court:

In addressing your Honors, we realize we are speaking to an Admiralty Court, familiar with ships, shipping and the seas, and that to such a court we do not have to stress the obvious or elaborate the detail. We confine ourselves to suggesting the fundamentals, ignoring the inconsequential, and endeavoring to keep this,—as its name implies,—brief.

PERILS OF THE SEA

Counsel argue that the storm was not a peril of the sea (pp. 10 to 21). They cite certain testimony of Captain McMunagle that the storm was not unusual or unanticipated, and that he had seen the same conditions three or four times before. This testimony, however, is contradicted by the *official records* of his own ship, the STONETOWN, which, as pointed out in our Opening Brief, pp. 45-6, show that in the whole period covered, only nine readings recorded waves of 45 feet or higher, and that of those nine, *seven occurred on the day of the PENNSYLVANIA'S loss, the readings being on a 3-hour basis, and extending for eighteen consecutive hours* (Exh. 92); and that the PENNSYLVANIA'S storm was the *only* time when waves of 45 feet or over were combined with a temperature of 32° F. or below (Exh. 91 and 92). (The effect on steel of freezing temperatures is known.) Furthermore Captain McMunagle himself was frank enough to admit, as pointed out in our Opening Brief (p. 28), that this storm was "as bad as you can get." If it is "as bad as you can get," it *must* be a peril of the sea.

Counsel next cite the testimony of Captain Mori of the KOTO MARU, to the effect that this was a "big storm," but that he had seen the same kind before. This testimony did not negative sea peril, for, as pointed out in our Opening Brief, a storm does not have to be absolutely unprecedented to constitute a peril of the sea. Regardless of that, the fact is that the official records contradict him.

Both of these men are further contradicted by the unimpeached and uncontradicted testimony of Mr. Danielson and Dr. Rattray that a search of the official records showed that this was the worst storm in the North Pacific in thirty years.

Counsel cite the fact that the CYGNET III, a Liberty ship, survived. True, she did. But it proves nothing. And her own captain testified it was the worst storm he had ever seen in all his years at sea. (Tr. 1657).

But of course we do not have to go as far as that. The classical definition of "perils of the seas," as stated by Judge Wallace in the Warren Adams, 74 Fed. 413, at page 415, still holds good:—

> "That term (perils of the sea) may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur.' "

Of course as a defense, this may be swept away by a showing of negligence or unseaworthiness. But as a definition of "peril of the sea," it is perfect. The thing which caused the PENNSYLVANIA to founder was

water inside of her, particularly No. 2 hatch being full of water when the tremendous seas put the deck cargo adrift, tore off the tarpaulins and opened this hatch. Certainly it would be impossible to find a plainer "peril of the sea," or a plainer cause of loss.

The best review of the authorities which we have found defining perils of the sea is in The Keynor, 1943 A.M.C. 371, on pages 378-381 (cited also by counsel on page 29 of his brief).

After reviewing all these authorities the Court said:—

> "From these authorities it is clear that to constitute a peril of the sea the accident need not be of extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence."

In substance this is the same definition as in The Warren Adams.

STORM CENTER

On pages 21 to 25 of counsels' brief, they take exception to our statement that the PENNSYLVANIA was nearer the center of the storm than other ships. We rely on the synoptic charts to show that, and we think they do. Mr. Danielson's testimony is cited by counsel as contrary. But we do not think it is. In order to illustrate his theory that the storm remained stationary for a time, fed by cold air from Alaska, he drew a circle on Exhibit 101, showing a radius of about 2° or approximately 120 nautical miles, and put the center, of the *circle,* not the *storm,* at around 50° North to about 138° West, and

said that the storm would remain somewhere within this area for a specific period of time; but added that various analysists might analyze this at a slightly different point (Tr. 1303-4). All he was doing was indicating the general center of the storm as being somewhere within that circle, and we believe that circle overlaps the eye of the storm, as shown on the synoptic charts, although we do not have the charts in front of us to compare it.

The further testimony cited by counsel to the effect that Danielson said the extreme weather conditions would be further south (Tr. 1402) apparently refers, not to the seas, but to the air, wind velocity and turbulence, rain showers, snow showers, etc., possibly in the upper atmosphere where the cold jet was streaming in from Alaska. We still believe that, for what it may be worth, the PENNSYLVANIA, as shown by the synoptic charts, was nearer the center than any other ship, but we do not attach too much importance to it, for certainly the storm was bad enough wherever the center was.

THE LAW OF PERIL OF THE SEA AND THE EXCEPTIONS UNDER CARRIAGE OF GOODS BY SEA ACT OF 1936 AND THE CANADIAN WATER CARRIAGE OF GOODS ACT OF 1936

Counsel's brief argues this on pages 25 to 39. The substance of their argument is that a peril of the sea is not a good exception if the loss is also occasioned by a concurrent cause for which the shipowner is liable. This is correct and we accept it. The case of the MANCHURIA is a good example. But we do not accept counsels' further contention that the shipowner "has the burden of proving that the storm was the sole proximate

cause of the vessel's loss" (Br. p. 25). The true rule is that if the shipowner proves even prima facie peril of the sea as a cause of the loss, then the burden shifts to the cargo to prove some other contributing cause, as e.g., negligence or unseaworthiness. In other words, the shipowner having proved peril of the sea, does not have to negative all other causes. On the contrary, it is up to the cargo to prove some one of those other causes. See: Kalamazoo Paper Co. v. C.P.R., 1950 S.C.R. 356 (1950), 2 D.L.R. 369 (Supreme Court of Canada), Kurth Maltine Co. v. Colonial Steamship Ltd. (1953) Ex. C.R. 194 (Exchequer Court of Canada) and other authorities cited on page 10 of our opening brief.

There is nothing new about this. As long ago as 1851 Mr. Justice Nelson said,—"Hence it is that, although a loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff (here the consignee) to establish the negligence the affirmative lies upon him." Clark v. Barnwell (1851), 53 U.S. (12 Howard) 272, 280; 13 L. Ed. 985, 988. And if the issue be left in doubt or "if it may as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover." id. This is still the law, approved by this Court in The Nelson Traveler, 1938 A.M.C. 752.

It is strange that counsel cite on page 29 of their brief the Keynor case. For in that case the Court said:

> "I believe that the appellant has succeeded, and the trial Judge has so found, in establishing that there has been a peril of the sea. There is even more

> than a mere 'prima facie case.' It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed." The Keynor, 1943 A.M.C. 371, 381.

We do not review the cases cited on pages 25 to 38 of counsel's brief. Some are Harter Act cases clearly inapplicable. None of them supports the contention that the shipowner must prove that peril of the sea was the sole cause of loss excluding all other causes. The shipowner having proved peril of the sea, the cargo owner must prove some other concurrent cause establishing liability, and if the issue is in doubt, as Mr. Justice Nelson said in Clark v. Barnwell, the cargo owner must fail.

PRESUMPTION OF UNSEAWORTHINESS

Counsel discusses this on pages 44-46 of his brief. We think this hardly needs a reply. Of course there are cases where a vessel suffers damage, or even sinks, without any adequate explanation, and naturally a presumption of unseaworthiness arises. It is a species of res ipsa loquitur. It is, however, only a presumption and can be refuted by contrary evidence of her seaworthiness.

The doctrine obviously has no application here, where the loss of the PENNSYLVANIA is fully explained by the terriffic storm which she encountered. The South Coast, 71 F. 2d 891, 893-894.

"EVIDENCE OF A DEFECTIVE HULL STRUCTURE"

This is counsel's heading on page 46 of his brief, the discussion continuing through to page 71. Since we have

discussed this in our two previous briefs, we reply now only briefly.

On pages 57 to 59 the brief states that the PENNSYLVANIA had wavy bottom plates. We are tempted to ignore this, since these plates had nothing whatever to do with the loss. They occurred intermittently between No. 2 and No. 5 (Tr. 2400), and there is not a shred of evidence or suggestion that they failed in any way. But, rather than leave the Court in the dark, we will explain them.

These plates were the same ones which the A.B.S. surveyors noted in their various reports and declared to be of no consequence and not affecting seaworthiness. Our own Coast Guard, Mr. Gilmour for Lloyds Underwriters, the representatives of the Government who sold the ship to petitioner, and everybody who ever examined her, agreed with them, and pronounced the ship seaworthy.

The deepest distortion was only ¾ of an inch, the average only ¼ (Tr. 2400).

Mr. D. P. Brown, whose testimony on pages 2784-2791, 2796-2799, and 2813, shows his wide knowledge of the subject, said this waviness did not affect the ship's seaworthiness "in any respect" (Tr. 2796).

Counsel say that where the distortion is greater than ⅜ of an inch, Lloyds Register of Shipping required strengthening of the tank tops. We inquire: "What of it?" The ship was classed in the American Bureau of Shipping, which does not agree with Lloyds on the point in question. Counsel's statement that the Bureau Veri-

tas, and the Netherlands Ship Builders Research Association require it is not borne out by the record. They apparently only had it under discussion. Neither is the statement that our Coast Guard required it in some districts, for any such slight waviness as the Pennsylvania had. Nor that the Maritime Administration has proposed it. Their proposal (apparently not carried out) related to strengthening *all* tank tops without regard to bottom waviness (Tr. 420-421). Of all the classification societies, Lloyds appears to be the only one (See the testimony of D. P. Brown [Tr. 2813]), and even it did not lay ships up for it, but only required it "as soon as possible" (Tr. 2405).

Since all this is unrelated to the loss we apologize to the Court for giving so much time to it.

On page 67, the Insurance Brief says the petitioner must come forward with "a specific and adequate explanation for the structural failure of the vessel allowing entry of water in No. 1 hold."

Not only is there no evidence that there were *any* "structural failures" at No. 1 hold, but, if there were, petitioner *has* come forward with the explanation,—the storm, a peril of the sea. Petitioner does not have to show *exactly how* the storm penetrated No. 1 hold. The law does not exact that, especially with all the crew dead and no survivor to testify. The admiralty is a practical system and recognizes the limitations of proof. It does not demand the impossible.

Even if this were not so, even if the crew had survived, all the petitioner would have to show would be

the terrific intensity and duration of the storm. Claimants would then have to prove unseaworthiness—a difficult job in face of the fact that the ship passed through Storm No. 1 unscathed, and battled Storm No. 2 for more than 20 hours before succumbing, during which she executed the most dangerous maneuver a ship can make in those conditions, turning around.

The leading case on the entry of seawater requiring explanation is The Folmina. It is there said: It "was not shown that the vessel encountered sufficient stress of weather to *warrant the inference* that it (the water came in because of the action of external causes" (emphasis supplied). The Folmina, 212 U.S. 354, 360, 53 L. Ed. 546 at page 550. Plainly the PENNSYLVANIA'S weather did "warrant the inference."

Incidentally, the hold was not "flooded" as counsel say. It was "taking water."

"EVIDENCE OF DEFECTIVE STEERING SYSTEM"

This is the heading on page 71 of the Insurance Brief. We went into this somewhat fully in our two previous briefs, and certainly do not wish to re-hash it now. That the storm would put an extra stress and strain on the steering gear is obvious. And equally obvious is it that any mechanical device may fail at times.

We reply, however, to counsel's criticism of our interpretation of the radiograms, where we said it was incorrect to say that the ship could not steer by any method. (See our Opening Brief, pp. 102-3).

When the message, sent at 1807 G.M.T., said "endeavoring to steer course of 110 degrees," it certainly meant that the master had *some* method of steering. Otherwise the message is senseless. Either he still had the regular gear but was handicapped in holding a true course of 110° by the tremendous seas, just as Captains McMunagle and Maeda were, or else he was using some alternate gear, presumably the hand-steering gear. The only other messages relating to this subject are the one sent at 1905 G.M.T., saying "down by head cannot steer," and the one at 2015Z saying "using hand steering." These later messages must be read in the light of the first. In the very first one, sent at 1807, the words "can't steer" are the same words as used in the later message. And yet in that first message the words "can't steer" are qualified by his statement that he is *endeavoring* to steer a course of 110°. We therefore think the reasonable interpretation is that he never was completely without steering ability, but at some stage had to fall back on hand steering.

On the effectiveness of hand-steering, compared with regular steering from the bridge, we refer the Court to Mr. Vallet's testimony as follows:

> "Q. Now, is there any emergency steering apparatus? If, for example, this electrical hydraulic motor that you described was out of commission for some reason or other, is there any other system?
>
> A. Yes, there is a hand pump, rotary pump, located in the steering engine room.
>
> Q. How does that work?
>
> A. Well, that merely pumps hydraulic fluid to the rams, and it just takes the place of the electric motor.

Q. In other words, to get the hydraulic pressure on the rams it has to be done by hand; is that the idea of it?

A. That is right.

Q. Then in order to maneuver the ship do you turn the same wheel?

A. The same wheel, yes.

A. So the hand work that is done in steering by hand, then, is the work of pumping the hydraulic fluid; is that the idea?

A. Yes.

Q. That pumping must be done by having a man in this engine room?

A. It would take several men.

Q. How many men would you say it would take?

A. Well, there is only room for about two men. It is extremely hard work, and a man couldn't keep it up for any length of time.

Q. In other words, if you got two or three men back there they would have to take turns at it to get anyplace at all; is that right?

A. That is right.

Q. As a matter of fact, that steering system by working the hydraulic pump wouldn't be very effective if you had heavy weather or mountainous seas, would it?

A. That is correct.

Q. You would not be able to keep a vessel out of the trough of a heavy sea, would you?

A. Probably not." (Tr. 2558-9)

This is confirmation of our interpretation that the messages only mean that when the regular gear temporarily failed he at once used the hand-steering gear, but that he could not steer with it as well.

Incidentally we may remind the Court that the time of sending the messages does not fix the time of using the gear at all. That use could fall anywhere between

the time limits of the messages.

Of course, all the evidence being in the radiograms themselves, and nowhere else, this Court is just as able to interpret them as was the Trial Court. The finding that the ship was not able to steer by "any method" was drafted by Government's counsel and adopted by the Trial Court without any discussion of the radiograms.

It may well be asked:—Was the steering gear the proximate cause of the loss at all? When it was fixed, the ship was still afloat. But she could not steer because the rudder was too far out of water. In that posture, what really sank the ship was the water in her holds. Did the steering gear cause that? It may be surmised. But there is no direct evidence of it, and the burden is on claimants to prove it as a cause of the loss.

We do not reply to counsel's suggestion that the 110° message does not indicate the ship had turned around. We think that is obvious since her previous course on the Great Circle Route was approximately 290°. The 110° message clearly indicates a 180° turn. (Our Opening Brief, p. 18.)

We just briefly mention the authorities cited by counsel. We hope the Court will read them. They have no resemblance to this case at all. The A.H.F. Seeger, 104 F2d 167, and The Meanticut-Bedford, 65 F.Supp. 203, are both cases where there was a definite, ascertained defect in the steering gear, and the ship, having pleaded inevitable accident, was required to furnish the strict and exacting proofs which the law demands to

sustain that defense. The Ionian Pioneer, 236 F.2d 78, was an old wreck of a ship ready for the scrap-heap, sustaining so many steering failures and other faults (without any exculpatory bad weather) as to be unique. (In view of counsel's predeliction for Lloyd's, it is interesting to note that she was classed in that Society.) The Court stated the rule on presumptions as follows:—

It said that cargo has the advantage of "a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail *shortly after the beginning of the voyage without accident, stress of weather,* or the like, furnishing an adequate explanation as a likely cause" (emphasis supplied) p. 80.

The Ionian Pioneer, leaving San Pedro Harbor on a quiet evening in those still waters, ran aground when she had hardly got started, because she could not steer (pp. 81-2).

We close this discussion of the steering gear by pointing out one very significant, and it seems to us, controlling factor:—*Not a single witness through all this long trial came forward to say that the type of steering gear on the PENNSYLVANIA, or the methods of inspecting it and testing it were in the slightest degree improper. The Government, largest claimant here, had all the benefit of the U. S. Coast Guard, the Navy and all the ships of the Maritime Administration. No single witness was produced from these or the whole American Merchant Marine to say that the inspections and tests of the steering gear, which counsel now urge to have been inadequate were in anyway faulty in the*

least degree. It is only counsel, who now, without any supporting evidence, make these suggestions, and, on the basis of them alone, ask this Court to disregard the evidence of all the practical and experienced men who had to do with the upkeep and maintenance of this ship.

"EVIDENCE OF THE UNSEAWORTHY CONDITION OF THE FORWARD HATCHES, THE INSECURE CARRIAGE AND STOWAGE OF FORWARD DECK CARGO"

Such is the heading on page 81 of the Insurance Brief.

We have discussed these matters fully in our two previous briefs (Opening Brief, pp. 109-122; Answering Brief, pp. 43-51). Our only comments now are these:—

Counsel is mistaken in saying that the Trial Court "found" that the taking off of the tarpaulins and No. 2 hatch filling with water were "the product of the unseaworthy condition of the forward hatches and stowage of cargo on forward deck" (Brief, p. 81). He repeats the same mistake on page 82, where he says that the evidence "supports the Court's *finding* that this condition (deck cargo and hatches) was a *factor of unseaworthiness, existing at the inception of the voyage,*" etc. (Emphasis supplied.)

As pointed out in our Opening Brief, at pages 119, 122, and again in our Answering Brief, at page 50, the Trial Court made no such finding at all. All he found was that the deck cargo came adrift taking the tarpaulins off the forward hatches, and that No. 2 was open and full of water. He did not say why. He found no fault with the

stowage, or the hatches (Finding IV). The obvious cause was the seas.

Our only other comment is to state the obvious physical fact that as long as the ends of the cross-battens were brought into juxtaposition over the center of the hatch, and there screwed up and tightened with the turnbuckles, it would not make any difference whether they were bent or not; and even the adverse witness, Huston, the carpenter, admitted that he could only recollect tightening two turnbuckles on No. 2 and No. 3 hatches, and then only about three times (Tr. 2086), which certainly is not unusual on a long voyage across the Pacific; and that he kept them tight at all times. Tr. 2807).

LATENT DEFECTS

Our argument on Latent Defects (Opening Brief, pp. 124-129), was in reply to claimants' assertion of notch-sensitivity in the vessel's hull,—not to complaints against the steering gear. (The incidental mention of the latter was merely a reference to the Trial Court's opinion wherein he said that all the alleged defects, which would of course include the steering gear, were "latent" and not "apparent." As our brief showed, we urged that if "latent" and not "apparent," then due diligence would not disclose them.)

Counsel say we did not plead "latent defects" in our petition. Of course not. We denied, and still deny, that there were *any* defects. Our petition stated that petitioner was without any "neglect, fault or negligence." Claimants denied this, and alleged, among other things, lack

of due diligence. These allegations and denials, of course, put in issue the defense of "latent defect," if it should come to light.

But regardless of this, as your Honors too well know, Admiralty Courts always allow parties to urge any defense, regardless of pleadings, which are not a surprise, and are warranted by the proofs.

We shall not re-argue that notch-sensitivity, if it existed at all, was a latent defect. We shall just take a quotation out of counsel's own brief, at page 95:—

> "A latent defect is one that could not be discovered by any known and customary test."

That notch-sensitivity perfectly falls within that definition is made plain by the uncontradicted testimony of D. P. Brown, Mr. Williams and Mr. Hechtman, all cited in our Opening Brief at pages 127-128.

"PETITIONER'S DEFENSE OF ERROR IN NAVIGATION"

This is the heading on page 97 of the Insurance Brief. Counsel mistakes us.

Petitioner claims that in turning around in those stormy seas, Captain Plover exposed his ship to dangers, recognized by all mariners, and that the very fact that the ship made the turn at all in those conditions, was proof of her seaworthiness; and that the damage she suffered (except the previous crack) was probably started during that turn, which, as Captain McMunagle said, could sink even a seaworthy ship. (Opening Brief, p. 81). That was the burden of our argument. We did not accuse Captain Plover of an error in navigation. He

was a competent captain, and is dead, and we make no reflection on him. We only said that the act of turning around was an act of navigation for which petitioner would not be liable. That is all.

DUE DILIGENCE

The remainder of the Insurance Brief is devoted to due diligence and the decisions applying it. This Court knows the law well, and we have covered the subject sufficiently in our previous briefs.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER-APPELLANT STATES STEAMSHIP COMPANY REPLYING TO THE ANSWERING BRIEF OF THE UNITED STATES OF AMERICA HEREINAFTER CALLED THE GOVERNMENT BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

We find it unnecessary to reply to the Government Brief, except in one particular.

BATTENS

In the Government's Opening Brief counsel cited Title 46, Code of Federal Regulations, § 144.10-80, regarding hatches (p. 51).

In our Answering Brief, we pointed out that this Regulation did not come into effect until eleven months after the loss of the PENNSYLVANIA (Ans. Br. 50).

Now the Government in its Answering Brief says that § 144.10-80 was miscited, and as an alternative falls back on § 43.10-35, reading as follows:

> "§ 43.10-35 *Battens and Wedges.* (a) Battens and wedges are to be efficient and in good condition." (Govt. Ans. Br. 31).

This Regulation appears in Subchapter E of Chapter I of Title 46 C.F.R., pertaining to Load Lines. Subchapter E in its present form, with its inclusion of § 43.10-35, was not promulgated until October 18th, 1952 (17 F.R. 9309), about ten months after the PENNSYLVANIA was lost. However, the same language appears under a different section number in the previous version of Subchapter E, and we therefore ignore the difference in time.

The language does not have the effect claimed for it by the Government. It is contained in a section of the Regulation relative only to *Load Lines.* Subchapter E is entitled "Load Lines." Subpart 43.10 is entitled "*Conditions* of Assignment of Load Lines" (emphasis supplied). § 43.10-1 (a) reads as follows:—

> "§ 43.10-1 *Construction of Vessel.* (a) The assignment of load lines is conditional upon the vessel being structurally efficient and upon the provision of effective protection to vessel and crew."

Then follow various prerequisites to the vessel having a load line assigned to it. § 43.10-30 specifies the type of cleats (to hold the battens and wedges around the sides and ends of the hatches). Then comes the language now relied on by the Government, which is in § 43.10-35:

> "§ 43.10-35 *Battens and Wedges.* (a) Battens and wedges are to be efficient and in good condition."

This can have no possible application to this case for two reasons: First, the Regulation is only a prescribed *condition precedent* to ships having assigned to them a load line. Once the load line is assigned, the condition has fulfilled its function. The PENNSYLVANIA had a load line assigned to it, thus showing that the prescribed condition had been fulfilled, and that her battens were good.

Second, there is no complaint anywhere in this record against the ship's *battens.* This Admiralty Court knows full well what the battens are,—the steel straps that go *around* the hatch coamings and under which the tarpaulins are tucked and the battens held in place by wedges driven into the cleats. There is not a syllable of complaint against them in this case. The only complaint (and a weak one at that) is against those steel straps going across the *top* of the hatch and variously denominated as "cross-battens," "storm battens," or "locking bars,"—entirely different things from the battens, and not required by the regulations. In fact, in Mr. Vallet's

testimony, where counsel for the Insurance Companies was getting Mr. Vallet to enumerate the various appurtenances of a hatch, counsel himself distinguished between the "battens" and the "storm battens" or "locking bars" (Tr. 307).

Incidentally, we do not think the mass of hundreds of Coast Guard administrative regulations, with their minutiae of detail, should be used as a basis for applying the Pennsylvania Rule, followed in The Denali, as attempted here by counsel; and certainly not where no specific Regulation, such as one specifying the thickness of steel plate, for example, is in question, but merely a general one, like this one of the battens, saying that they must be "efficient and in good condition."

Respectfully submitted,

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No. 15131

In the

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

REPLY BRIEF OF APPELLANTS

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

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JURISDICTION

This proceeding was commenced by the filing of a petition for exoneration from or limitation of liability by States Steamship Company as corporate owner of the SS PENNSYLVANIA. The petition was filed in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was acquired under Rules 51-55 of the United States Supreme Court Admiralty Rules.

The jurisdiction of this court was acquired under 62 Stat. 929, 28 U.S.C.A., § 1292.

INTRODUCTION

This brief is filed by appellants Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, in reply to the answering brief of petitioner, States Steamship Company, as the corporate owner of the SS PENNSYLVANIA.

Since the issues of fact and law presented by the record in this proceeding have been reviewed at length in our opening and answering briefs, we shall endeavor to avoid repetition and respond directly to certain specific matters presented in petitioner's answering brief.

As in the case of the opening brief filed by these appellants the issues reviewed herein relate primarily to the subject of limitation of liability under 46 U.S.C.A., § 183, and the clear error of the trial court in finding that the evidence was sufficient to show that the unseaworthy condition of the SS PENNSYLVANIA at the inception of her Voyage 6 was without the privity or knowledge of petitioner. However, as we have pointed out in our opening brief, as appellants, and in our answering brief, as appellees, petitioner's knowledge and privity respecting the unseaworthiness of the vessel is, under the evidence in this case, inseparably related to its failure to use due diligence within the meaning of the Carriage of Goods by Sea Act of 1936 and the equivalent Canadian statute. This circumstance follows as a matter of law in view of the substantial evidence that petitioner's failure to use due diligence, as found by the trial court, was the result of the personal neglect of petitioner's Marine Superintendent and other supervisory personnel em-

ployed by petitioner who were invested with high responsibility and charged with direct supervision over the very "phase of the business out of which the loss . . . occurred". *Coryell v. Phipps*, 317 US 406, 87 L ed 363, 1943 AMC 18.

This lack of due diligence and petitioner's corresponding privity therein is highlighted in petitoner's answering brief under its assertion that its Marine Superintendent fully discharged his responsibilities by delegating them to the unfortunate officers of this vessel. In fact the foregoing assertion by petitioner, in the total absence of justifying legal authority, is the principal subject of this reply brief.

ARGUMENT

I

Delegation to the Officers of the SS PENNSYLVANIA of Entire Responsibility for the Care, Maintenance, Inspection and Repair of the Vessel, Its Machinery and Equipment.

At page 8 of its answering brief, petitioner advances the proposition that its Marine Superintendent had "set up" or "succeeded to" a system for the upkeep of its vessels under which the officers of the ship, "particularly the Master and Chief Engineer, were held directly responsible for the proper upkeep, maintenance, and repair of their own ship". Petitioner further states,

without citing any supporting transcript reference (and none can be cited), that the system of relying directly upon the ship's officers for performance of these duties is that employed "in all well-run steamship operations by all companies".

The foregoing proposition employs the theory under which petitioner now seeks to avoid its privity or knowledge in the unseaworthiness of the SS PENNSYLVANIA. It pervades petitioner's entire answering brief and is advanced with respect to each factor of unseaworthiness of this vessel as found by the trial court.

According to petitioner, this system was applied with respect to the vessel's hull, steering machinery, hatch securing equipment, the condition of the forward hatches and the carriage and stowage of deck cargo on the forward deck at the inception of Voyage 6. Vallet, the Marine Superintendent, relied upon the officers of this vessel to make the necessary inspections and submit recommendations for further needed inspections or repairs, and he assumed that everything was all right if he received no such recommendations or any adverse reports from the personnel employed aboard this particular vessel (petitioner's answering brief, pp 10-11, 34, 45, 50).

In fact, Petitioner asserts at page 11 of its brief that Vallet was "diligent in the extreme" in enforcing this

system. The implication then follows that since the Marine Superintendent was so diligent in delegating his responsibility under this system to a group of company employees, consisting of deck officers and the chief engineer, Vallet exercised due diligence with respect to the vessel and could not be in privity with any neglect or omission on the part of the employed personnel to whom he had delegated his duties.

It is not surprising that petitioner cites no authority justifying, or in any way condoning, the system "set up" or "succeeded to" by Mr. Vallet, for all authorities are to the contrary. It is surprising that petitioner would confess to such a system of delegation and reliance by its Marine Superintendent since under authorities reviewed in our opening and answering briefs, the delegation of entire responsibility to ship's officers, and the complete reliance upon them by the Marine Superintendent is not the exercise of due diligence for purposes of liability under the Carriage of Goods by Sea Act, or a means of avoiding privity or knowledge for purposes of limitation. We submit, in fact, that this system itself emphasizes the very lack of due diligence on the part of Vallet and forecloses any contention under the evidence that Vallet was not in privity with the unseaworthiness of the SS PENNSYLVANIA at the inception of her Voyage 6, and the failure of petitioner

to exercise due diligence as found by the trial court. Illustrative of the authorities reviewed in our prior briefs in this connection is the decision of this court in *The SILVER PALM*, 94 F2d 776 (9th Cir., 1937), 1937 AMC 1462, where the rule was stated at p 780, as follows:

> "In proceedings for limitation, the owner may not escape liability by giving the managerical functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge such an agent is its alter-ego."

An apt statement of the rule is made in *The ARGENT*, 1940 AMC 508, where the court stated, at p 509:

> "It would, however, be a very easy matter for an owner to shelter himself behind an actual ignorance if lack of personal knowledge always constituted a good defense to the extent of the protection accorded by statute. If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners, would be at a premium. Such assumption of ignorance would be peculiarly easy on the part of corporate owners. Corporate owners have of late years greatly multiplied, and it is accordingly found that the doctrine of imputed knowledge and imputed privity has grown to meet the demands of business.
>
> "In this case I think it conclusively proven that no officer of the petitioning corporation knew that

the Argent maintained an unlawful light but for the matter of that they did not know whether she maintained a light at all, they did not regard it as any part of their business to ascertain whether that humble vessel was complying with the law or violating it every day."

. . .

"As long ago as *Republic*, 61 Fed. 109, knowledge of what owners could have seen if they had looked was imputed to them . . .".

See also:

Austerberry v. U. S., 169 F2d 583 (6th Cir., 1948) at p 594:

". . . the burden was upon the appellee to show that it had no privity or knowledge . . . To sustain the burden of proof that is imposed in cases like this it may be observed that it is not sufficient to show that operations and care of the vessel were placed in the hands of men of experience in such matters . . .".

. . .

"The burden was upon the government to prove that it had no privity or knowledge of negligence, or that there was no privity or knowledge or the means of knowledge of negligence on the part of those to whom it had delegated the duties of commanding, maintaining, and operating the vessel."

In *The POCONE*, 159 F2d 661 (2nd Cir., 1947), 1947 AMC 306, a subordinate traffic manager was delegated supervision over the condition of the company's

ships as they came into port and attention to any repairs they might need. The case involved cargo damage by fire and water arising from a fire in coal stowed in a cross bunker, and the personal neglect of the subordinate traffic manager was held to preclude limitation of liability by the corporate shipowner. The failure of the traffic manager to exercise due diligence was described by the court, at pp. 664-665, as follows:

> "We charge Borges [the traffic manager] with all that the master knew, not because the master knew it, but because it was his duty from what the master told him and what he saw, *not to accept the master's assumption that all was well*, but to push inquiries home, to cross-examine the master, to examine the engine room logs, and in general to bestir himself until he had all the information that anyone on board had. As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake . . . *The measure in such cases is not what the owner knows, but what he is charged with finding out.* He may, if he will, put his ship at hazard and answer as he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion." (Emphasis supplied)

Petitioner admits that Vallet had complete charge of maintenance and repair of the vessel (petitioner's brief pp 8-9, Tr 140). The true extent of Mr. Vallet's

responsibilities and duties as Marine Superintendent appears in the following testimony of J. R. Dant, petitioner's Vice-President and General Manager:

> Q Will you say that the Marine Superintendent, Mr. Dyer, when he is in charge, has general authority to care for the repairs of the vessel *and supervision of what is necessary to be done on those vessels?*
>
> A Yes.
>
> Q And when he was absent, why, Mr. Vallet took his place?
>
> A Yes.
>
> Q And had the same authority that Mr. Vallet had; is that correct?
>
> . . .
>
> A Yes." (Emphasis supplied) (Tr 2623)
>
> "Q You would say that generally he was in charge of the making of the necessary repairs to the vessel?
>
> A That is correct.
>
> Q *And for the inspection thereof on behalf of your organization?*
>
> A Yes." (Emphasis supplied) (Tr 2624)

Nothing in the testimony of Mr. Dant provides authority, within petitioner's own organization, for the so-called system of delegation employed by Mr. Vallet under which he left the maintenance, upkeep and re-

pair of the vessel to the officers of the individual ship in question.

Vallet's failure to exercise due diligence through his reliance upon this system of delegation and his corresponding privity in the inadequacies of inspection and repair resulting therefrom are emphasized by the lack of any satisfactory evidence as to the qualifications of the ship's officers to assume and carry out such duties. There is no evidence of the qualifications of Captain Plover, Master of the SS PENNSYLVANIA, in the field of marine survey and inspection of a vessel's hull, machinery and equipment, or that he ever undertook or participated in such inspections. Petitioner's reference to Mr. Brenneke's testimony on the qualifications or responsibilities of a chief engineer (petitioner's answering brief, p 8; Tr 321-322) is not in the least persuasive.

An examination of the actual testimony of Charles E. Matthews, chief engineer on the SS PENNSYLVANIA during Voyage 1 through 5, inclusive, will disclose the limitations in the actual inspections made by Matthews, and his individual limitations as a qualified marine surveyor. Matthews joined the ship on February 1, 1951, for Voyage 1. At that time he "looked her over just visually or casually" (Tr 336-338). He "watched" the repairs undertaken to the Class 1 deck

fracture in Portland, Oregon on February 5 (Tr 341). There is no evidence of an independent or thorough inspection by Matthews as to the vessel's entire hull, machinery or equipment following the Class 1 casualty sustained on Voyage 5, either when the vessel was in Portland, Oregon for repairs or subsequently in drydock in Seattle, Washington at the conclusion of Voyage 5. The participation by Matthews in the drydock inspection of the vessel at the conclusion of Voyage 5 is indicated by his testimony:

> "I was just an observer. If I happen to see anything I could report it to the port engineer and inspectors . . ." (Tr 347).

He was not with the American Bureau of Shipping or the Coast Guard inspectors all the time and could not state whether or not these personnel hammer tested the vessel (Tr 348-349). His limitations as a marine surveyor charged with responsibility for the integrity of the vessel's hull and requisite inspections and repairs following a serious hull casualty, are illustrated by his testimony:

> "Q The cracked deck that you have spoken of on Voyage 1, would you consider that was a Class 1 casualty?
>
> A I don't know much about the class of casualties." (Tr 369)

Matthews did not repair the cross battens on the forward hatches as he did not receive a request from the deck department to make any such repairs (Tr 2830).

As to the condition of the steering machinery, Vallet looked to Matthews for necessary inspections and reports of needed repairs. The inspection of this vital machinery by Matthews was confined to an external observation of the steering engine while the vessel was operating at sea, and even worse, it appears that such inspection was made primarily by an unlicensed oiler on watch (petitioner's answering brief p 11; Tr 350-351). By way of analogy, petitioner might as well contend that a seaman-lookout could be charged with responsibility for navigation of the vessel upon delegation of authority in this respect from the Master or watch officer.

No further evidence appears in the record of this proceeding as to the qualifications of other officers on the SS PENNSYLVANIA to assume the heavy responsibility delegated to them by Vallet.

Petitioner should know that it cannot discharge the duties of its marine department by delegating them to the officers of a particular ship, and thereby avoid privity in the unseaworthiness of the vessel arising from inadequate inspections and repairs. The corporate ship-

owner cannot shelter itself behind an actual ignorance arising from lack of adequate reports from its ship's officers, or a lack of recommendations by its ship's officers as to needed inspections or repairs to the vessel's structure, machinery and equipment. To support petitioner's asserted system of delegation to and reliance upon the officers of this ship would place "imbecility, real or assumed, . . . at a premium". *The ARGENT*, 1940 AMC 508 (D.C.S.D.N.Y., 1915).

Under the Limitation of Liability Act, knowledge or privity "means not only personal cognizance but also the means of knowledge—of which the owner *or his superintendent* is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." (Emphasis supplied) *The CLEVECO*, 154 F2d 605 (6th Cir., 1946).

II

The Privity of Petitioner's Supervisory Personnel

A. The Marine Superintendent and Assistant Port Engineer.

Referring to Vallet individually, petitioner goes on to assert that Vallet discharged his duties in full by operating under the "well recognized principle" of holding the ship's master, chief engineer and officers

responsible for their ship (petitioner's answering brief, p 34). Petitioner then states that Vallet enforced this system and "by his staff made additional inspections". It is obvious that under petitioner's system of delegation and primary reliance upon the ship's officers, any inspections made by Vallet and his shore staff were incidental, superficial and supplementary in nature. The evidence confirming Vallet's personal lack of due diligence in the maintenance, upkeep and repair of this vessel, its equipment and machinery, has been reviewed in detail in our previous briefs.

At pages 41-43 of our opening brief, the standards recommended and prescribed by Vallet for inspection and repair of a vessel after sustaining a serious fracture are set forth. Petitioner has taken exception to our reference to Vallet's testimony in this respect (petitioner's answering brief, pp 24-25). Although the time element for such an inspection is not material in this case, we must take exception to petitioner's implication that a four or five day *drydocking* would be required for a thorough inspection of the vessel's hull *and* machinery. The drydock examination for the underwater body of the vessel took one day (petitioner's answering brief, p 26) but no one assumes that a four or five day drydocking would be necessary for a thorough inspection of the vessel's machinery.

In any event, aside from the time element necessary to a thorough inspection of the vessel, it is clear that the hull of this vessel was never given the inspection prescribed by Vallet as necessary after it sustained the Class 1 hull fracture on Voyage 5. Vallet testified that the Voyage 5 fracture was a serious crack and that this meant to him that a thorough examination must be made of the vessel (Tr 262). Vallet showed that he was completely cognizant of the significance of a Class 1 hull casualty, which has been defined as one which has weakened the main hull structure so that the vessel is lost or in a dangerous condition (Tr 1864-1865) or one where the strength of the structure is so weakened that it would be in imminent danger of further failure (Tr 2770).

Vallet then testified that a "complete" and "detailed" inspection of the hull would require that the vessel be completely unloaded, be placed on drydock, and that such an inspection would involve going inside the vessel, examining all the welds on the inside, and all of the main structures (Tr 226-229). Quite aside from the inadequacies of petitioner's inspection of the vessel's steering machinery and hatch securing equipment, the record discloses that the hull of the SS PENNSYLVANIA was never accorded an inspection complying, at the very minimum, with the standards prescribed by Vallet as aforementioned.

The indifference of Vallet to enforcement of standards of inspection in this instance is illustrated by the fact that he dispatched his Assistant Port Engineer, Mr. Brenneke, to inspect the vessel in Seattle, Washington at the conclusion of Voyage 5 without giving Brenneke any specific instructions to supervise and direct a thorough examination of the vessel conforming to the very requirements specified by Vallet. Mr. Brenneke, accordingly, limited his superficial examination of the vessel to the routine underwater body inspection which had been scheduled at the annual survey in August, 1951 (Tr 1717). Neither Mr. Vallet nor Mr. Brenneke conveyed to the inspecting personnel of the U. S. Coast Guard or the American Bureau of Shipping any information or instructions relating to the vessel or its recent Class 1 hull casualty which would affect the degree and extent of their inspection (Tr 684-685; 769).

Petitioner speculates that the personnel of these organizations "probably knew" of the Class 1 fracture on the previous voyage, although the evidence is to the contrary (petitioner's answering brief, p 27). The interrogation of witnesses on this subject on the part of counsel for cargo claimants was direct and not covert as asserted by petitioner (petitioner's answering brief, p 28). Petitioner's counsel was entirely free to interrogate these witnesses independently and to develop

any further information which he might feel was lacking in the record, but did not choose to do so at the trial of this proceeding.

The inspecting personnel of the American Bureau of Shipping and the U. S. Coast Guard did not, as petitioner contends (petitioner's answering brief, p 29) go "all over the vessel". No examination was made of the main deck of the vessel and no thorough examination was made of the interior of the vessel's hull or cargo compartments, and at the time of this inspection the vessel was not even unloaded.

However, Vallet and his marine department did not depend in any event upon the inspections and surveys of the American Bureau of Shipping and the U. S. Coast Guard (Tr 231). Vallet's duties in the exercise of due diligence were, of course, to the ship, its crew and cargo and not the obtaining of certificates of surveyors. *The NINFA*, 156 F 512 (D.C.D. Ore., 1907); *The FELTRE*, 30 F2d 62 (9th Cir., 1929), 1929 AMC 279. In truth, as petitioner has confessed, Vallet depended upon the officers of this ship and in the absence of recommendations or adverse reports from them he assumed that all was well.

We must take note of the inconsistencies in petitioner's reference to Vallet's Assistant Port Engineer, Mr.

Brenneke. According to petitioner, Mr. Brenneke was one of the "competent shore-side staff" which Vallet was so diligent in employing (petitioner's answering brief, p 8); "a thoroughly competent man" who "needed no specific instructions" and "knew what an inspection should be" (petitioner's answering brief, p 26). When allusion is made to Brenneke's status in management hierarchy, however, Brenneke is referred to as an inconsequential "minor character" (petitioner's answering brief, p 4) and as a footman "chasing from one place to another on attendance to vessels" (petitioner's answering brief, p 35). Despite its alternate deprecatory treatment of Mr. Brenneke, petitioner cannot escape its privity in the negligence of Mr. Brenneke as well as the negligence and omissions of Mr. Vallet under the rule of *The POCONE*, supra, and that stated in *In Re P. Sanford Ross*, 204 F 248 (2nd Cir., 1913) at p 251:

> "The real test is not as to their being officers in a strict sense, but as to the largeness of their authority."

Justifiably, petitioner is concerned over the evidence of numerous fractures in the deck of the SS PENNSYLVANIA, as reviewed at pages 47 through 51 of our answering brief. It asserts that these cracks were not

significant and did not affect the seaworthiness of the vessel. However, petitioner overlooks the testimony of David P. Brown, on cross-examination, that "these small one or two inch cracks can be dangerous" (Tr 2783) and the testimony of petitioner's witness, Coast Guard Commander Rivard that any crack in the plates of the vessel's main deck is of importance and affects its seaworthiness (Tr 618-619; 647-648).

Mr. Nordstrom disclosed his complete lack of qualification and ignorance on the subject of brittle fracture when he disagreed with Mr. Brown of the American Bureau of Shipping and Commander Rivard as to the significance of cracks in the vessel's main deck (Tr 2885-2886).

Petitioner's theory that the Voyage 5 Class 1 deck fracture had no effect on the structural integrity of the vessel was not accepted by the trial court, in view of the substantial evidence to the contrary, and as reflected in the trial court's finding of fact No. V. Furthermore, as reviewed in our prior briefs, the strain-aging to which this vessel's hull had been subjected had been developing over a period of years and was actually evidenced by the major deck fracture sustained on Voyage 5.

B. Inspection of the Steering System.

Previously in this brief we have commented upon the limited inspection of the vessel's vital steering machinery resulting from Vallet's system of delegating responsibility to Chief Engineer Matthews and Matthew's delegation, in turn, of inspection to an unlicensed oiler on watch at sea. In our answering brief, we have noted that petitioner confined inspection of this machinery, while the vessel was in port during its August, 1951 survey, to a dockside operating test of the main steering system and external examination of the steering parts. We have pointed out that petitioner has failed to produce any evidence of inspection complying with the standards of examination for this very type of machinery prescribed by *The IONIAN PIONEER*, 236 F2d 78 (5th Cir., 1956), 1956 AMC 1750, and *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1946), 1946 AMC 178.

It is indeed surprising that petitioner now refers to a survey of the vessel's machinery conducted by the United States government in February, 1949 under which hydraulic pumps of the steering gear were opened and examined (petitioner's answering brief, p 42; Exh. 147). This survey, of course, evidences the exercise of due diligence by the United States government in the inspection of the steering machinery of this ves-

sel consistent with standards specified by the above authorities. The inspection was made, as petitioner states, two years before the vessel was purchased by petitioner and approximately three years before the vessel was lost. Petitioner apparently implies that it is entitled to rely upon due diligence exercised by a former owner of the vessel. This is a novel proposition supported by no authority.

C. Privity in the Unseaworthy Condition of the Forward Hatches and the Insecurity of the Stowage and Carriage of the Deck Cargo.

In endeavoring to avoid privity in the foregoing phase of the vessel's unseaworthiness, petitioner again resorts to its system of delegation of responsibility to the officers of the ship and our previous comments on this system of delegation and reliance are again applicable.

As to Vallet's privity in the unseaworthy stowage of deck cargo, petitioner would alter the record of Vallet's following testimony:

> "When the vessel is loaded and properly stowed and bunkered, we advise the Master to that effect, and we leave it up to him when he should leave." (Tr 284). (Petitioner's answering brief, pp 14-15)

Petitioner now desires to substitute the word "stored" for stowed as used by Vallet in his above testimony, since petitioner asserts that Vallet was not discussing the loading of the vessel in so testifying. The reporter's transcription of Vallet's testimony, as above quoted, is clearly correct since the word "stowed" as used by Vallet relates directly to the prior clause "when the vessel is loaded".

In seeking to avoid privity as to the insecure stowage of the deck cargo forward, petitioner ignores the testimony of well-qualified master mariners that the stowage of the cargo on the forward decks was unseaworthy, considering the season and waters to be traversed, and petitioner endeavors to minimize the fact that this stowage was reported daily to its Seattle office by a supercargo regularly employed by petitioner. This supercargo operated under Mr. Pitzer's supervision and direction (Tr 237) and was on hand aboard the SS PENNSYLVANIA in charge of the loading for States Steamship Company "to see that the cargo is loaded the way we want it loaded" (Tr 1167). Referring to Mr. Pitzer, head of petitioner's Operating Department, Vallet testified:

"Q Does he have charge of the loading of the vessel?

A Yes.

. . .

Q If you have a vessel coming into Seattle or Tacoma, he goes up there, does he, or someone —.

A Not necessarily, he don't. He possibly has a supercargo in attendance.

Q *It is under his supervision and direction then, I take it?*

A Yes." (Tr 237) (Emphasis supplied)

The privity and knowledge of petitioner in the unseaworthy condition of the hatches and the insecure carriage and stowage of the forward deck cargo is reviewed in our opening brief at pages 50 to 58, and in our answering brief at pages 81 to 93. We believe that our prior discussion of this phase of the vessel's unseaworthiness refutes the treatment of the subject appearing at pages 43 to 51 of petitioner's answering brief, and need not be repeated at this time.

CONCLUSION

The record in this proceeding provides abundant support for the findings of the trial court that the SS PENNSYLVANIA was unseaworthy at the inception of her fatal voyage, that petitioner failed to exercise due diligence to make the SS PENNSYLVANIA seaworthy for this voyage and that such unseaworthiness was the proximate cause of the vessel's loss.

The evidence also demonstrates that the failure of petitioner to exercise due diligence, as found by the trial court, was the personal negligence and omission of petitioner's marine superintendent and other supervisory personnel who were invested with high responsibility in the company's management and operations. The failure of these individuals to exercise due diligence in the performance of their duties precludes petitioner's right to limit its liability in this proceeding.

Respectfully submitted,

KOERNER, YOUNG, MCCOLLOCH, & DEZENDORF
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Proctors for Appellants Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company

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Proctors for Appellant The Dominion of Canada.

No. 15135

United States
Court of Appeals
for the Ninth Circuit

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska; JOHN McKINNEY, as Director of Finance of the Territory of Alaska; DON M. DAFOE as Commissioner of Education of Alaska and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-13-56

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Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-13-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

For Plaintiff-Appellant:

HOWARD D. STABLER,
P. O. Box 546, Juneau, Alaska;

HENRY C. CLAUSEN,
315 Montgomery St., San Francisco.

For Defendant-Appellees:

J. GERALD WILLIAMS,
Attorney General;

EDWARD A. MERDES,
Assistant Attorney General,
P. O. Box 2170, Juneau, Alaska.

United States District Court for the District of Alaska, Division Number One, at Juneau

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated, Plaintiff,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN McKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants.

COMPLAINT

1. This action is in equity to restrain an unlawful and unconstitutional expenditure of public funds and arising also under the First, Fifth and Fourteenth Amendments to the United States Constitution and Sections 1981, 1982, and 1983 of Title 42 of the United States Code, to redress the deprivations under color of territorial law, of a right secured by the Constitution of the United States and made applicable to the Territory of Alaska by Section 23 of Title 48 of the United States Code, all

of which more fully appears hereinafter. The taxpayer plaintiff of the Territory of Alaska sues to restrain certain territorial officials from disposing of funds appropriated by the Territorial Legislature for the transportation of children to parochial and church schools. The jurisdiction of this Court is invoked also under Section 101 of Title 48 and Section 1343 of Title 28 of the United States Code.

2. At all times mentioned herein, plaintiff has been and is the owner of real and personal property located in the Juneau-Douglas Independent School District and in the Territory of Alaska, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes to the Territory of Alaska as provided by law; and within one year before the commencement of this action has paid a Territorial Income Tax, a resident fisherman's license tax, an automobile license tax, a $7.50 school tax and a hunting license tax to said territory.

3. [The citizen, resident taxpayers of said Territory number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to like injury and damage as the injuries complained of in plaintiff's complaint.] There are common questions of law and of fact affecting their rights and a common relief is sought. These persons united in interest with plaintiff are too numerous to make it practical to bring them before the Court, and plaintiff, therefore, brings this action on his own behalf as such owner, resi-

dent, citizen and taxpayer, and also in behalf of each and all the said citizens and residents and taxpayers of said school district and Territory.

4. The Legislature of the Territory of Alaska, by Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session), enacted a purported statute providing for the transportation of children attending certain non-public schools in said Territory, which said purported statute reads as follows:

"An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.

"Be It Enacted by the Legislature of the Territory of Alaska:

"Section 1. The Legislature recognizes these facts:

"(a) Attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

"(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

"Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.

"Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

"Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature."

5. The Legislature of said Territory, by Chapter 6 of the Session Laws of Alaska of 1955 (Extraordinary Session) enacted a general appropriation bill appropriating out of monies in the General Fund of said Territory the sum of $1,250,000.00 for "transportation to schools," part of which sum of $1,250,000.00 was, and is by said Legislature in-

tended to be made available during the school biennium beginning July 1, 1955, and ending June 30, 1957, for the transportation to non-public schools of pupils coming within the provisions of the aforesaid Chapter 39 SLA 1955.

6. [The funds so appropriated from said General Fund for transportation to schools are obtained in part from the regular and special taxes paid and required to be paid to said Territory by plaintiff and other taxpayers similarly situated as aforesaid.]

7. Defendant Don M. Dafoe is the Commissioner of Education of the Territory of Alaska, and as such is charged by the aforesaid Chapter 39 SLA 1955 with the administration of the transportation program provided for therein. Defendants A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin are members of the Board of Education of said Territory and as such are charged by the aforesaid Chapter 39 SLA 1955 with directing and supervising the said Commissioner of Education in his administration of said transportation program. Defendant Hugh Wade is the Treasurer of the Territory of Alaska and as such is charged, as provided by law, with the disbursement of monies in the General Fund of said Territory upon warrants drawn by the Director of Finance of said Territory. Defendant John McKinney is the Director of Finance of said Territory and as such is charged, as provided by law, with drawing warrants for any just and

true and legal charge against said Territory and for which an appropriation has been made by the Legislature of said Territory.

8. Under and by virtue of said Chapter 39 SLA 1955 and the appropriation for "transportation to schools" contained in said Chapter 6 SLA 1955, the aforesaid defendants, and their agents, servants, officers and employees will, unless enjoined and restrained by an order of this Court, pay out and expend from the Territorial Treasury of said Territory during the school biennium commencing July 1, 1955, and ending June 30, 1957, a substantial portion of said $1,250,000.00 for the transportation of pupils to non-public schools, including sectarian and denominational schools; and such sums will thereby be lost from the public funds of the territory and from the possession of said Hugh Wade as Treasurer thereof; and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof.

9. The aforesaid Chapter 39 SLA 1955 and Chapter 6 SLA 1955 were and are ultra vires, null and void, and in excess of the power and jurisdiction of the Legislature of the Territory of Alaska to do, pass, enact, provide for, or adopt, and said expenditures are for an unconstitutional purpose, in this and in each of the following respects:

(a) Said purported legislation contravenes the limitations of the Organic Act of said territory, to

wit, Section 77 of Title 48 of the United States Code, which provides, in part, as follows:

> "* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *"

in that said legislation appropriates public money for the transportation of pupils to sectarian and denominational schools, thereby facilitating attendance at such schools, saving such schools the expense of themselves providing transportation for pupils, and releasing for other school purposes funds which would otherwise be employed by the schools for such transportation; and said legislation thereby materially supports and substantially benefits such schools.

(b) Said purported legislation and expenditures violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act (Sections 1981, 1982, and 1983 of Title 48 of the United States Code) all made applicable to said Territory by Section 23 of Title 48 of the United States Code, in that said legislation appropriates public monies for and provides for the transportation of pupils to sectarian and denominational schools conducted not merely for educational purposes but also for the purpose of indoctrinating children in the particular dogma of

the religious sect which conducts the schools. Said legislation thereby grants preferences to and aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion. Said legislation also thereby compels plaintiff and other taxpayers similarly situated to be taxed for the support and aid and assistance of, and indirectly to contribute money for the propagation of sectarian and denominational dogma and which they disbelieve, and therefore deprives plaintiff and said other taxpayers of their property without due process of law by compelling them to pay taxes for and to contribute money for an unconstitutional purpose, to wit, the support and aid and assistance of a religious establishment.

(c) Said legislation violates the Fourteenth Amendment to the United States Constitution and the said Civil Rights Act, made applicable to said territory as aforesaid, and contravenes the limitations of the Organic Act of said Territory, to wit, Section 77 of Title 48 of the United States Code, in that there is denied to plaintiff and the other taxpayers similarly situated the equal protection of the laws, and it is class legislation, and it is not uniform in operation, to wit, in that defendants will necessarily enforce said legislation by reason of its wording in a grossly disproportionate manner so as to constitute a deliberate and intentional discrimination against plaintiff and said other taxpayers by expending public money thereunder for the transportation of children to the schools of one particular

sect of which plaintiff is not a member, which sect will, by comparison with the benefits received by other non-public schools, receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated.

9. Plaintiff has no plain, speedy or adequate remedy at law to prevent such unlawful and unauthorized expenditures.

10. Said intention and acts of defendants to enforce and implement said legislation by paying out public money for the transportation of pupils to sectarian and denominational schools will injure and take from plaintiff and the other taxpayers of said territory their said property and property rights, and will cause him and them material and irreparable loss.

Wherefore, plaintiff prays for judgment as follows, to wit:

1. That the said Chapter 39 SLA 1955, and so much of the said Chapter 6 SLA 1955 as appropriates public money for the transportation of pupils to non-public schools as aforesaid be declared null, void and of no force and effect.

2. That the defendants and their agents, servants, officers and employees be enjoined and restrained from carrying into effect the aforesaid statutory provisions and from paying out of the territorial treasury or otherwise expending any money appropriated or to be appropriated by the Legislature of said territory for the transportation

of pupils to non-public schools, and from contracting for the transportation of any pupils to non-public schools, and from contracting for the transportation of any pupils to non-public schools at Territorial expense.

3. For costs of suit and general relief.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed November 3, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above-named defendants:

You are hereby summoned and required to serve upon Howard D. Stabler of plaintiff's attorneys, whose address is P.O. Box 546, Shattuck Building, Juneau, Alaska, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of servicee. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ J. W. LEIVERS,
Clerk of Court.

Dated November 3, 1955.

Returns on service of summons attached.

[Endorsed]: Filed November 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT

Notice of Motion

To: Howard D. Stabler, Attorney for plaintiff, Box 546, Juneau, Alaska.

Please take notice that the undersigned will move this Court at 2:00 p.m. on Friday, November 25, 1955, or on the first regular motion day thereafter, in the District Court, Federal Building, Ketchikan, Alaska, for an Order dismissing the complaint on the grounds set forth in the defendants' motion.

Dated at Juneau, Alaska, this 18th day of November, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ EDWARD A. MERDES,
Assistant Attorney General,
Attorney for Defendants.

Motion

The defendants, all appearing specially, move this Court for an order dismissing the complaint herein on the grounds that (1) it fails to state a claim against the defendants upon which relief can be granted and (2) it does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public.

Dated at Juneau, Alaska, this 18th day of November, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ EDWARD A. MERDES,
Assistant Attorney General,
Attorney for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed November 18, 1955.

[Title of District Court and Cause.]

MINUTE ORDER
TUESDAY, DECEMBER 20, 1955

This case came before the Court for hearing arguments on defendants' Motion to Dismiss. H. D. Stabler appeared in behalf of plaintiff; Edward Merdes, Assistant U. S. Attorney General appeared for defendants. The court advised counsel that the time limit applicable to arguments on motion day would not be imposed. Mr. Merdes presented his argument which Mr. Stabler answered and thereafter Mr. Merdes closed. Counsel filed their briefs and the Court took the matter under advisement. Defendant allowed two Weeks to file Reply Brief.

[Title of District Court and Cause.]

OPINION

Filed: March 26th, 1956.

Henry C. Clausen, San Francisco, California, and Howard D. Stabler, Juneau, Alaska, for Plaintiff.

J. Gerald Williams, Attorney General, and Edward A. Merdes, Assistant Attorney General, for Defendants.

Hodge, District Judge.

Plaintiff in this action as a resident taxpayer of Alaska seeks to enjoin the Treasurer, Director of Finance, Commissioner of Education and members of the Board of Education of the Territory of Alaska from an alleged illegal expenditure of public funds and from carrying into effect the provisions of Chap. 39, SLA 1955, being an act entitled

> "An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws";

and the provisions of Chap. 6, SLA 1955, Extraordinary Session, appropriating money from the General Fund of said Territory for "transportation to schools," or such part thereof as appropriates public money for transportation of pupils to non-public or sectarian schools.

The Act in question provides that in those places in Alaska where transportation is provided under existing laws for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools,

> "where such children, in order to reach such non-public schools, must travel distances comparable with and over routes the same as the distances and routes over which the children attending public schools are transported."

Plaintiff attacks the validity of such legislation upon three grounds: (1) That such legislation contravenes the limitations of the Organic Act of Alaska, 48 U.S.C.A. Sec. 77, which prohibits the appropriation of any public money "for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government"; (2) That said legislation violates the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act, 42 U.S.C.A. 1981-83, in that it aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion, and therefore deprives plaintiff and other taxpayers of their property without due process of law; (3) It violates the Fourteenth Amendment of the Constitution and the Organic Act in that it denies to plaintiff and other taxpayers similarly situated the equal protection of law and is class legislation.

Defendants have moved for an order dismissing the complaint upon the grounds that (1) It fails to state a claim against the defendants upon which relief can be granted; and (2) It does not allege that plaintiff will suffer any injury that will not be suffered in common by the general public. The controlling question before the Court is whether or not the action presents a justiciable controversy and whether there is sufficient showing as to the plaintiff's right to maintain this action.

The following allegations of the complaint must be noticed as pertinent to this issue:

> "The citizen, resident taxpayers of said Territory, number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to like injury and damage as the injuries complained of in plaintiff's complaint.
>
> "The funds so appropriated from said General Fund for transportation to schools are obtained in part from the regular and special taxes paid and required to be paid to said Territory by plaintiff and other taxpayers similarly situated as aforesaid."
>
> (Under and by virtue of said Acts the defendants) "will, unless enjoined and restrained by an order of this Court, pay out and expend from the Territorial Treasury * * * during the school biennium * * * a substantial portion of

said $1,250,000.00 for the transportation of pupils to non-public schools, including sectarian and denominational schools; and such sums will thereby be lost from the public funds of the Territory * * *; and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof."

The rule is well settled that with respect to a taxpayer of the United States he cannot maintain an action to enjoin public officials from carrying out Acts of Congress upon the grounds of invalidity of the Act except where there is some direct injury suffered or threatened, presenting a justiciable issue; and he must show not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with the general public. Massachusetts vs. Mellon (Frothingham vs. Mellon), 262 U.S. 447; Alabama Power Co. vs. Ickes, 302 U.S. 464, 478; Perkins vs. Lukens Steel Co., 310 U.S. 113, 125; Elliott vs. White, 23 F. 2d 997 (in which the same issue of "promotion of religious views and establishment of religious and sectarian institutions" is involved); Duke Power Co. vs. Greenwood County, 91 F. 2d 665, 676; Wheless vs. Mellon, 10 F. 2d 893, 894-5; Railway Express Agency vs. Kennedy, 189 F. 2d 801, 804.

An injury in a legal sense which may justify such an action is defined as follows:

> "The principle (that one who is threatened with direct and special injury may maintain such action) is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Power Co. vs. T.V.A., 306 U.S. 118, 137; Fallbrook Public Util. Dist. vs. District Court, (C.C.A. 9), 202 F. 2d 942.

This rule has been applied in Federal courts to a suit by a taxpayer to declare acts of state legislatures invalid as in conflict with the Federal or State constitution. Williams vs. Riley, 280 U.S. 78; Columbus & Greenville Ry. Co. vs. Miller, 283 U.S. 96, 99; Doremus vs. Board of Education, 342 U.S. 429, 434 (expressly holding that what the Court said of a Federal statute in the Massachusetts vs. Mellon case is "equally true when a state Act is assailed."

The rule is otherwise as to a taxpayer's suit against a municipality or county, as to which it is universally held that a taxpayer may maintain a suit in equity to restrain a city or county from unlawful expenditure of public funds, which distinction is recognized in Massachusetts vs. Mellon upon the principle that the interest of a taxpayer of a municipality in the application of its moneys

is direct and immediate, and by reason of the peculiar relation of the corporate taxpayer to the municipal corporation. Crampton vs. Zabriskie, 101 U.S. 601; Valentine vs. Robertson and City of Juneau, 300 F. 521.

The application of such rule in the State courts is a matter upon which such courts are divided, and plaintiff concedes that the majority rule upholds the right of a taxpayer to bring such an action, such decisions resting largely on the same grounds as to municipal or county funds. 52 Am. Jur., Taxpayers' Actions, Sec. 6, p. 4; Anno. 58 A.L.R. 589.

The majority rule of the state courts has been followed by the Supreme Court of the Territory of Hawaii and with respect to the Government of Puerto Rico. Lucas vs. American Hawaiian E & C Co., 16 Hawaii 80 (following the rule as to local or municipal legislation of Crampton vs. Zabriskie); Castle vs. Secretary of Hawaii, 16 Hawaii 769; Castle vs. Kapena, 5 Hawaii 27; Ruscaglia vs. District Court of San Juan (C.C.A. 1), 145 F. 2d 274.

With apparent due consideration to these conflicting views, the rule of Massachusetts vs. Mellon has now been definitely applied in this jurisdiction. Sheldon vs. Griffin (C.C.A. 9), 174 F. 2d 382; Shelton vs. Wade (D.C. 1st Div.), 130 F. Supp. 212. (See also Demmert vs. Smith, 82 F. 2d 950, where the question was previously considered by the Circuit Court of Appeals, but left undecided as not necessary to decision in such case.)

In the Sheldon vs. Griffin case, in which a resident taxpayer sought to declare invalid the provisions of the Unemployment Compensation Code of Alaska, the opinion of the Court states as follows:

> "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Citing Frothingham vs. Mellon and other cases.)

In the Shelton vs. Wade case Judge Folta discussed the matter of the majority and minority views of the State courts and the Federal rule, in an action by a taxpayer to enjoin a transfer of public funds from the General Fund of the Territory to the Unemployment Compensation Fund, and concludes upon the express decision of Sheldon vs. Griffin that:

> "Since the plaintiff has not shown that he will suffer any injury that will not be suffered in common by the general public, he has no standing to sue, and hence the decision of the

Court of Appeals for this Circuit is dispositive of this controversy and requires that the motion for a preliminary injunction be dismissed."

Plaintiff seeks to distinguish Sheldon vs. Griffin from the facts in this case upon the grounds that in the former no public funds were involved; and that the Court found that the statute under attack "adds nothing to the burden of the taxpayers of Alaska." However, the decisions cited by the Circuit Court in support of its ruling, and others supporting the Mellon rule, do not appear to make any distinction in the application of such rule between legislation involving expenditures of public funds and other legislation complained of; and in fact, as recognized by Judge Folta in the Wade case, the rule of Massachusetts vs. Mellon which is adopted by our courts is based instead upon the doctrine of the separation of powers between the legislative and judicial branches of government. (Opinion of Mr. Justice Sutherland, pp. 488-489.)

Plaintiff also contends that Judge Folta in the Wade case failed to distinguish the difference between the taxpayer's status in Sheldon vs. Griffin and the taxpayer's status in the Wade case, who would suffer by illegal expenditures from taxpayer contributed funds; and in effect asks that Sheldon vs. Wade be overruled. But again I fail to find such distinction in the authorities examined, nor that Judge Folta erred in this respect, but on the contrary the learned Judge expressly commented upon

the decision of Judge Dimond in adopting the majority view (78 F. Supp. 466), which was reversed by the Circuit Court. Plaintiff also suggests that the decision of Judge Reed in the case of Wickersham vs. Smith, 7 Alaska 522, should be compared as more logical. However in this opinion, in which the whole subject is reviewed in considerable detail (pp. 528-537) Judge Reed finally concluded that he was unable to pass upon this point.

Hence the contention of plaintiff that Sheldon vs. Griffin is not authority for the decision of Sheldon vs. Wade, and that the rule of the Hawaii and Puerto Rico cases should govern instead in this instance, cannot be sustained.

I am unable to find from the allegations of the complaint that plaintiff has alleged any injury different from that of the general public. In fact, the allegations of the complaint as noted above are quite to the contrary. Nor can I agree that the term "general public" is any different in the legal sense used than "resident taxpayers," which "number many thousands." Therefore the decision of the Circuit Court of Appeals for this Circuit is decisive of this case.

In view of this decision it is unnecessary to pass upon the questions of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff. The motion for dismissal is granted and the case dismissed.

Dated at Nome, Alaska, this 22nd day of March, 1956.

/s/ WALTER H. HODGES,
District Judge.

[Endorsed]: Filed March 26, 1956.

In the United States District Court for the District of Alaska, Division Number One, at Juneau

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff,

vs.

HUGH WADE as Treasurer of the Territory of Alaska, JOHN McKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants.

JUDGMENT AND DECREE

This cause came on to be heard on defendant's Motion to Dismiss, under Rule 12(b), Federal Rules

of Civil Procedure, on the grounds that: (1) It failed to state a claim against the defendants upon which relief can be granted; and (2) It does not allege that the plaintiff will suffer any injury that will not be suffered in common with the general public; and the questions of law raised by the Motion having been argued before the Court on December 20, 1955, by counsel for each party who thereafter filed briefs in support of their arguments; and the Court being fully informed and having on March 26, 1956, erndered and filed herein its written opinion to which reference is made,

It Is Hereby Ordered, Adjudged and Decreed that the Complaint be and it is hereby dismissed for the reasons stated in the Court's opinion of March 26, 1956, and

It Is Further Ordered, Adjudged and Decreed that defendant recover attorney fees in the amount of $250.00.

Dated: April 18, 1956.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given: That the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final judgment and decree, and the whole thereof, dated April 18, 1956, and entered April 23, 1956, in the above-entitled court and cause, ordering, adjudging and decreeing that the plaintiff's complaint be dismissed for the reasons stated in the court's opinion of March 26, 1956; and further ordering, adjudging and decreeing that defendants recover attorney fees in the amount of $250.00.

Dated: Juneau, Alaska, May 8th, 1956.

HENRY C. CLAUSEN,

HOWARD D. STABLER,
Attorneys for Plaintiff-Appellant;

By /s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men by These Presents: That we, Woodrow W. Reynolds, as Principal, and General Casualty Company, a corporation, as Surety, hereby acknowledge ourselves to be indebted and firmly bound to pay to the above-named defendants the sum of Five Hundred Dollars ($500.00), in good lawful money of the United States of America, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of May, 1956.

The condition of this obligation is such that whereas the above-bounden plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree of the above-entitled court, in the within-entitled cause, dated April 18, 1956, and entered by the Clerk of said Court on April 23, 1956, wherein and whereby it was ordered, adjudged and decreed that the plaintiff's complaint be dismissed, and that the defendants recover attorney fees in the amount of Two Hundred and Fifty Dollars ($250.00).

Now, therefore, if the said plaintiff shall satisfy said judgment and decree in full, together with said

attorney fee, costs, interest and damages for delay, if for any reason the appeal is dismissed, or if said judgment and decree is affirmed, and to satisfy in full such modification of the judgment and decree and such costs, interest and damages as the appellate court may adjudge and award, then this obligation shall be null and void; otherwise to remain in full force and effect.

/s/ WOODROW W. REYNOLDS,
Principal.

[Seal] GENERAL CASUALTY COMPANY;

By /s/ F. DEWEY BAKER,
Its Attorney in Fact,
Surety.

Taken and acknowledged before me the 8th day of May, 1956.

[Seal] /s/ HOWARD D. STABLER,
Notary Public for Alaska.

My commission expires October 8, 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

In the District Court for the District of Alaska,
First Judicial Division

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff,

vs.

HUGH WADE, et al.,

Defendants.

OPINION

Filed April 23, 1956.

Henry C. Clausen, San Francisco, California, and Howard D. Stabler, Juneau, Alaska, for Plaintiff.

J. Gerald Williams, Attorney General, Edward A. Merdes and Henry J. Camerot, Assistants Attorney General, for Defendants.

Hodge, District Judge.

Under date of March 22, 1956, this Court rendered an opinion in the above-entitled cause ordering that the motion of the defendants for dismissal be granted. The parties have each submitted form of judgment, one of which provides for the recovery of attorney fees in favor of the defendants and the other of which does not. The Court of its own motion requested that briefs be submitted upon the question of whether or not attorney fees are prop-

erly allowable as costs to be prevailing parties where such parties are officers of the Territory, and represented by the Attorney General, a salaried officer of said Territory.

Rule 54 (d) F.R.C.P. provides that

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

It is held that under this Rule the recoverable costs are limited to ordinary taxable costs, and do not include the allowance of attorney fees, although resort may be had to express statutory authority under state laws. Cohen vs. Beneficial Industrial Loan Co., 7 F.R.D. 352, 356; Gold Dust Corporation vs. Hoffenberg, 87 F. 2d 451; Kramer vs. Jarvis, 86 F. Supp. 743.

It is universally held that attorney fees in actions generally are not recoverable as costs except when specifically allowed by statute. Resort must then be had to the language of the Alaska statute, Sec. 55-11-51, A.C.L.A. 1949, as follows:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action

or defense thereto, which allowances are termed costs." (Underscoring added).

The allowance of such fees is in the discretion of the Court and, as Judge Dimond has indicated, the allowance of attorney fees to the prevailing party under this statute is customarily made in the courts of Alaska. Columbia Lumber Co., Inc., vs. Agostino, 184 F. 2d 731, 736; United States vs. Breeden, 14 Alaska 214, 110 F. Supp. 713. The precise question here is whether under our statute there is anything to indemnify. The Attorney General contends that the Territory should be allowed indemnity for the public expense in defending such an action. Counsel for the plaintiff asks

> "Who is the party to be indemnified? Certainly not the Territory of Alaska which is not a party; certainly not the defendants who have not incurred any expense in the action; and certainly not the salaried Attorney General."

No express decision upon this interesting point is cited in the briefs, nor am I able to find such upon exhaustive research. The Attorney General argues that the right of the Territory to collect such attorney fees if granted by the Court, notwithstanding counsel for the Territory are salaried officers, appears heretofore to have been presumed or conceded in most instances, citing decisions from the First Division in which such fees have been allowed as costs, but not indicating whether this question was raised in such cases. Hence these de-

cisions are not controlling and it appears that the dearth of decisions upon the question is largely attributable to the fact that statutes of this character are rare.

That a state is authorized to collect attorney fees as costs is held in the State of Missouri vs. State of Illinois, 202 U.S. 598, in which the Supreme Court stated that (page 600)

> "There is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case."

In the case of Solomon vs. Welch (D.C. Cal.) 28 F. Supp. 823, it is held that a defendant officer of the United States is entitled to recover

> "all such costs as would be allowed to any other prevailing party,"

although there is no reference in such decision to allowance of attorney fees. An attorney's docket fee under the provisions of Title 28, Sec. 1923, U.S.C.A., has been allowed in the Federal courts to be taxed as costs in favor of the United States, in the discretion of the Court, in United States vs. Bowden (CCA 10) 182 F. 2d 251, and United States vs. Murphy (D.C. Ala.) 59 F. 2d 734.

The right of the United States to recover costs is considered and allowed in a number of decisions. See Moore's Federal Practice, Vol. 6, pp. 1339, 1340; Barron and Holtzoff, Fed. Prac. & Proc., Vol. 3, p. 29. Attorney fees, if allowed under our statute,

are of course deemed a part of such taxable costs. Pilgrim vs. Grant, 9 Alaska 417; Forno vs. Coyle (CCA 9) 75 F. 2d 692.

Upon the authority of these decisions, and in the absence of any statute or decision to the contrary, it must be concluded that the Territory, like the United States, is entitled to the same consideration with respect to allowance of attorney fees as costs as any other litigant. No distinction appears where the action is prosecuted or defended by Territorial officers in their official capacities. Solomon vs. Welch, supra. In this connection the true test appears to be the nature of the suit or the relief demanded, which in this instance is actually against the Territory, represented by its officers. 86 C.J.S., Territories, 646, Sec. 38. There is no question but that under the provisions of Sec. 9-1-8, A.C.L.A. 1949, the Attorney General is empowered, and it is his duty, to represent public officers in such action. Reiter vs. Wallgren, 184 Pac. 2d 571; State ex rel Dunbar vs. State Board, 249 Pac. 996, 999. Hence, in answer to plaintiff's specific question, it is the Territory of Alaska which may be indemnified and not the defendants individually or the Attorney General. Such attorney fees may therefore be allowed in the discretion of the Court.

Touching upon the matter of discretion, plaintiff contends that it is the paramount duty of the Attorney General, for the protection of the interests of the people of the State, where he is cognizant of violations of the Constitution or the statutes by a

Territorial officer, to obstruct and not to assist such officer in carrying out any illegal acts, and hence that the Attorney General should have instituted this action in the first instance, to test the validity of the statute in question, citing Sec. 9-1-8, A.C.L.A., 1949, and Reiter vs. Wallgren and State ex rel Dunbar vs. State Board, supra.

The statute referred to provides

> "Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory or a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law."

This statute clearly leaves the matter of instituting suits and actions whenever the constitutionality or validity of any statute is seriously in doubt to the discretion of the Attorney General. It is not the province of the courts to interfere with discretion thus vested in the Executive Branch of the Government, unless such action is shown to be arbitrary or capricious. No demand appears to have been made upon the Attorney General to prosecute such action, which otherwise might change the picture. Instead, the office of the Attorney General was called upon to defend the action in the public interest, for which reason the usual or customary practice should prevail.

The amount of fee to be allowed depends upon the nature and extent of the services rendered. This case did not go to trial but was disposed of upon motion to dismiss upon Rule 12 (b), F.R.C.P., but did require considerable time and labor on the part of the Assistants Attorney General in briefing the question for determination by the Court. Under these circumstances I feel that a fee of $250.00 is reasonable to be allowed to the defendants in this action.

Judgment submitted by the Attorney General is entered accordingly.

Dated at Nome, Alaska, this 18th day of April, 1956.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

STATEMENT BY APPELLANT OF POINTS TO BE RELIED ON AND DESIGNATION OF RECORD FOR PRINTING

Appellant above named states that the points on which he intends to rely on appeal in this action are as follows:

1. The Court erred in dismissing the complaint herein.

2. The Court erred in ordering that defendants recover attorneys' fees in the amount of $250.00, or in any amount.

3. The Court erred in entering judgment for defendants, dismissing the complaint and ordering that defendants recover attorneys' fees.

4. The Court erred in finding and concluding that the complaint does not allege that the plaintiff will suffer an injury that will not be suffered in common by the general public.

5. The Court erred in finding and concluding that a plaintiff who alleges that he is a taxpayer of the Territory of Alaska and that territorial officials are about to make an unlawful expenditure of territorial funds alleges no injury different from that of the general public, and makes no sufficient showing as to his right to maintain the action, and suffers no direct or special injury entitling him to sue.

6. The Court erred in not finding that plaintiff alleged a direct and special injury entitling him to sue, and alleged an injury different from that of the general public, and made a sufficient showing as to his right to maintain the action.

7. The Court erred in finding and concluding that the action presents no justiciable controversy.

8. The Court erred in concluding that it is the law of the Ninth Circuit that a plaintiff who alleges he is a territorial taxpayer and that territorial

funds are about to be unlawfully expended makes no showing sufficient to allow him to sue in equity to restrain such an unlawful expenditure of territorial funds.

9. The Court erred in not applying the rule of the First Circuit and the courts of Hawaii that a territorial taxpayer may sue to enjoin an unlawful expenditure of territorial funds.

10. The Court erred in concluding that it was unnecessary to pass upon the question of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff.

11. The Court erred in not finding that plaintiff had alleged a claim for relief on the grounds that an unlawful expenditure of territorial funds is involved.

Appellant hereby designates for printing the entire certified transcript of the record as filed with the Clerk of the Court of Appeals.

Dated: May 9, 1956.

HENRY C. CLAUSEN,

HOWARD D. STABLER,

By /s/ HOWARD D. STABLER,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT OF RECORD

It is stipulated by and between the attorneys for the respective parties herein: that in printing the record in this case for use in the United States Court of Appeals for the Ninth Circuit all captions should be omitted after the title of the action has been once printed, and the name of the paper or document should be substituted therefor. All other parts of the record should be printed.

Dated: Juneau, Alaska, May 9th, 1956.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant,

/s/ EDWARD A. MERDES,
Asst. Attorney General of the Territory of Alaska, of Attorney for Defendants-Appellees.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all the Orders of the Court filed in the above-entitled cause,

and constitute the record on appeal as designated by the Appellant.

In witness whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 21st day of May, 1956.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15135. United States Court of Appeals for the Ninth Circuit. Woodrow W. Reynolds, on Behalf of Himself and All Other Taxpayers Similarly Situated, Appellant, vs. Hugh Wade, as Treasurer of the Territory of Alaska, John McKinney, as Director of Finance of the Territory of Alaska, Don M. Dafoe, as Commissioner of Education of Alaska and A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin, as Members of the Board of Education of the Territory of Alaska, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed May 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15135

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff-Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska; JOHN McKINNEY as Director of Finance of the Territory of Alaska; DON M. DAFOE as Commissioner of Education of Alaska and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants-Appellees.

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS

Agreeably to the provisions of Rule 17 (6) of the Rules of the above-entitled appellate court, the plaintiff-appellant hereby adopts and designates as his Designation of Record on Appeal and Statement of Points his "Statement by Appellant of Points to Be Relied on and Designation of Record for

Printing" filed in the above-entitled appellate court with the record on appeal.

Dated: Juneau, Alaska, May 31, 1956.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 4, 1956.

No. 15135

United States
Court of Appeals
for the Ninth Circuit

WOODROW W. REYNOLDS, etc.,

Appellant,

vs.

HUGH WADE, as Treasurer, Territory of Alaska, et al.,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-29-57

No. 15135

United States Court of Appeals for the Ninth Circuit

WOODROW W. REYNOLDS, etc.,

Appellant,

vs.

HUGH WADE, as Treasurer, Territory of Alaska, et al.,

Appellee.

Supplemental Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-29-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL OF RECORD

For Plaintiff-Appellant:

HOWARD D. STABLER,
P.O. Box 546, Juneau, Alaska;

HENRY C. CLAUSEN,
315 Montgomery St., San Francisco.

For Defendant-Appellees:

J. GERALD WILLIAMS,
Attorney General;

EDWARD A. MERDES,
Assistant Attorney General,
P.O. Box 2170, Juneau, Alaska.

In the District Court for the District of Alaska,
Division Number One—At Juneau

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska; JOHN McKINNEY, as Director of Finance of the Territory of Alaska; DON M. DAFOE, as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN, as Members of the Board of Education of the Territory of Alaska,

Defendants.

AMENDED JUDGMENT AND DECREE

This cause came on to be heard on defendants' Motion to Dismiss, under Rule 12 (b), Federal Rules of Civil Procedure, on the grounds that: (1) Plaintiff's complaint fails to state a claim against the defendants upon which relief can be granted; and (2) it does not allege that the plaintiff will suffer any injury that will not be suffered in common with the general public; and the questions of law raised by the Motion having been argued before the Court on December 20, 1955, by counsel for each party,

who thereafter filed briefs in support of their arguments; and the Court being fully informed and having on March 26, 1956, entered and filed herein its written opinion to which reference is made,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's complaint and action be, and they are hereby, dismissed; for the reasons stated in the Court's opinion of March 26, 1956; and

It Is Further Ordered, Adjudged and Decreed that defendants recover attorney fees in the amount of $250.00.

Dated this 4th day of March, 1957.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 7, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given: That Woodrow W. Reynolds, the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Amended Judgment and Decree herein dated March 4, 1957, and the whole thereof, and from the entry thereof in this action on March 7, 1957, in favor of the defendants and against the plaintiff, dismissing the plaintiff's com-

plaint and plaintiff's action for the reasons stated in the Court's Opinion of March 26, 1956; and awarding attorney fees to the defendants in the sum of $250.00.

Dated: Juneau, Alaska, March 8, 1957.

HENRY C. CLAUSEN and
HOWARD D. STABLER,

By /s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1957.

[Title of District Court and Cause.]

STIPULATION

Whereas, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the final Amended Judgment and Decree herein dated March 4, 1957, and from the entry thereof on March 7, 1957, has been duly served, made and filed herein,

Now, therefore, it is hereby stipulated by and between the respective parties, by their respective attorneys in said action, that the Record on Appeal, including the printed Transcript of Record, Statement of Designation of Record and Statement of Points, and all Briefs of the respective parties, and all other records and papers in this action heretofore filed in the said appellate court in its Case No.

15,135, may be used and considered by said parties and said appellate court for all purposes in this appeal; and that the supersedeas and cost bond in said action on appeal shall be continued in full force and effect for all purposes of this appeal.

Dated: Juneau, Alaska, March 8, 1957.

J. GERALD WILLIAMS,
Attorney General of Alaska, Attorney for Defendants-Appellees;

/s/ EDWARD A. MERDES,
Assistant Attorney General.

HENRY C. CLAUSEN and
HOWARD D. STABLER,
Attorneys for Plaintiff-Appellants;

By /s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed March 8, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, the duly appointed, qualified and acting Clerk of the above-entitled Court, hereby certify:

That on March 7, 1957, at Juneau, Alaska, in the above-entitled Court and cause, I duly entered in

the Civil Docket of said Court in my office the following entry of a final Amended Judgment and Decree dated March 4, 1957, to wit:

"March 7, 1957. Filed and entered, by direction of District Judge Hodge, Amended Judgment and Decree in this action dated March 4, 1957, in favor of the defendants and against the plaintiff, dismissing the plaintiff's complaint and action for the reasons stated in the Court's Opinion of March 26, 1956, and awarding attorney fees to the defendants in the sum of $250.00";

and on the same date I mailed to all attorneys of record in said action the following:

"You are hereby notified that on March 7, 1957, a final Amended Judgment and Decree dated March 4, 1957, was duly filed, entered and noted in the Civil Docket of the District Court for the District of Alaska, Division No. 1, at Juneau, Alaska, in Case No. 7397-A, entitled Woodrow W. Reynolds, on behalf of himself and all other taxpayers similarly situated, plaintiff, versus Hugh Wade, as Treasurer of the Territory of Alaska, et al., defendants, in favor of the defendants and against the plaintiff, dismissing the plaintiff's complaint and plaintiff's said action for the reasons stated in the Court's Opinion of March 26, 1956, and awarding attorney fees in favor of the defendants in the sum of $250.00, copy of which Amended Judgment and Decree you have heretofore received."

In Witness Whereof, I have hereunto set my hand and caused the seal of said Court to be affixed at Juneau, Alaska, March 7th, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of the Above-Entitled Court.

[Endorsed]: Filed March 7, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the originals thereof and all Orders of the Court filed in the above-entitled cause and constitute the Record on Appeal herein, the same being supplemental to the appeal heretofore heard in the Circuit Court for the Ninth Circuit, No. 15135.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Juneau, Alaska, this 11th day of March, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15,135. United States Court of Appeals for the Ninth Circuit. Woodrow W. Reynolds, etc., Appellant, vs. Hugh Wade, as Treasurer, Territory of Alaska, et al., Appellee. Supplemental Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed March 14, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated, *Appellant,* vs. HUGH WADE, as Treasurer of the Territory of Alaska, et al., *Appellees.*	

APPELLANT'S OPENING BRIEF.

HENRY C. CLAUSEN,
315 Montgomery Street, San Francisco 4, California,

HOWARD D. STABLER,
Box 546, Juneau, Alaska,

RICHARD G. BURNS,
315 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated, *Appellant,* vs. HUGH WADE, as Treasurer of the Territory of Alaska, et al., *Appellees.*	

APPELLANT'S OPENING BRIEF.

Plaintiff appeals from an order of the Trial Court granting a judgment on motion of defendants to dismiss plaintiff's complaint.

JURISDICTIONAL STATEMENT.

This is a taxpayer's suit in equity to restrain the Treasurer and other officials of the Territory of Alaska from making unlawful and unconstitutional expenditures of territorial funds and from carrying into effect a territorial statute compelling plaintiff

and other taxpayers to support non-public school transportation. (Tr. 3-4.)

Plaintiff is a citizen, resident taxpayer of the Territory of Alaska and sues on behalf of himself and all citizen, resident taxpayers of the territory similarly situated. (Tr. 4-5.) He challenges the validity of Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session) which provides (Tr. 5-6):

> "An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.
>
> "Be It Enacted by the Legislature of the Territory of Alaska:
>
> "Section 1. The Legislature recognizes these facts:
>
> "(a) The attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.
>
> "(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.
>
> "Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.
>
> "Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools,

transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

"Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature."

Plaintiffs also challenges so much of Chapter 6 of the Extraordinary Session Laws of Alaska of 1955 as makes a $1,250,000.00 school transportation appropriation available in part for transportation of pupils to and from non-public schools. (Tr. 6-7.)

Plaintiff alleges that the foregoing statutes, authorizing and appropriating in part public money for non-public purposes, namely, non-public school transportation, are void and in excess of the power of the Alaskan Legislature in each of the following respects (Tr. 8-11):

(a) They contravene the express limitations of the Organic Act of Alaska, 48 USCA Sec. 77, which provides (Tr. 9):

"* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any

sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *"

(b) They violate the First, Fifth, and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act, 42 USCA Secs. 1981-1983, made applicable to the Territory by 48 USCA Sec. 43, in that they appropriate public money for, grant preferences to, aid, and support sectarian education, thereby constituting laws respecting an establishment of religion and depriving plaintiff and other taxpayers of their property for an unconstitutional purpose.

(c) They violate the Fourteenth Amendment to the United States Constitution, the Civil Rights Act, and 48 USCA Sec. 77 in that there is denied to plaintiff and other taxpayers the equal protection of the laws, and they are class legislation, and they are not uniform in operation since the defendants will necessarily enforce said legislation, by reason of its wording, in a grossly disproportionate manner by expending public money for the transportation of children to the schools of one particular sect of which plaintiff is not a member, which sect will receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated.

The District Court had jurisdiction under 48 U.S.C., Sec. 101 pursuant to its general equity jurisdiction and also under 28 U.S.C., Sec. 1343 since this is a suit to restrain the deprivation of constitutional rights under color of territorial law.

This Court has jurisdiction under 28 U.S.C., Sec. 1291 to review the judgment of the United States District Court of Alaska, dismissing the complaint and allowing defendant $250.00 for attorney fees.

STATEMENT OF THE CASE.

The plaintiff, Woodrow W. Reynolds, brought suit on behalf of himself and all taxpayers similarly situated against defendants Hugh Wade, as Treasurer of the Territory of Alaska; John McKinney, as Director of Finance of the Territory of Alaska; Don M. Dafoe, as Commissioner of Education of Alaska; and A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin, as Members of the Board of Education of the Territory of Alaska. (Tr. 3, 7-8, 12.)

He alleged in his complaint that at all times mentioned he has been and is the owner of real and personal property located in the Juneau-Douglas Independent School District and in the Territory of Alaska, and a citizen, resident, taxpayer thereof; and assessed for and liable to pay taxes to the Territory of Alaska as provided by law; and within one year prior to the commencement of the action has paid a Territorial Income Tax, a resident fisherman's license tax, an automobile license tax, a $7.50 school tax and a hunting license to the Territory of Alaska. (Tr. 4.)

Plaintiff next alleged that the citizen, resident taxpayers of the Territory number many thousands; that plaintiff and these taxpayers are in the same class,

affected by all the matters alleged, and subject to like injury and damage; that there are common questions of law and fact affecting their rights, and a common relief is sought; that these persons united in interest with plaintiff are too numerous to make it practical to bring them before the court; and that plaintiff therefore not only sues on his own behalf, but also on behalf of "each and all the said citizens and residents and taxpayers of said school district and Territory." (Tr. 4-5.)

Plaintiff next set forth verbatim the language of Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session), which we previously quoted and which authorizes appropriations from territorial funds for non-public school transportation. (Tr. 5-6.)

In the following paragraph, plaintiff alleged that:

> "5. The Legislature of said Territory, by Chapter 6 of the Session Laws of Alaska of 1955 (Extraordinary Session) enacted a general appropriation bill appropriating out of monies in the General Fund of said Territory the sum of $1,250,000.00 for 'transportation to schools,' part of which sum of $1,250,000.00 was, and is by said Legislature intended to be made available during the school biennium beginning July 1, 1955, and ending June 30, 1957, for the transportation to non-public schools of pupils coming within the provisions of the aforesaid Chapter 39 SLA 1955." (Tr. 8.)

He then alleged that plaintiff and said taxpayers of the Territory will be forced to pay the funds so

appropriated from the regular and special taxes (Tr. 7); that the various defendants are charged by law with administering and supervising the said transportation program, as well as with drawing warrants and disbursing territorial monies for charges against said Territory and for which appropriations have been made (Tr. 7-8); and that by virtue of the said statutory provisions, the defendant territorial officials will, unless enjoined, expend from the Territorial Treasury during the school biennium commencing July 1, 1955 and ending June 30, 1957, a substantial portion of the said $1,250,000.00 for transportation of pupils to non-public, including sectarian and denominational schools, which funds will come from the Territorial Treasury and thereby greatly increase the taxes of plaintiff and other territorial taxpayers. (Tr. 8).

In the following paragraph, plaintiff alleged that the statutes are void and in excess of the power of the Territorial Legislature and that the expenditures are for an unconstitutional purpose in each of the following particulars (Tr. 8-11):

> "(a) Said purported legislation contravenes the limitations of the Organic Act of said territory, to wit, Section 77 of Title 48 of the United States Code, which provides, in part, as follows:
>
> > "'* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *'

"in that said legislation appropriates public money for the transportation of pupils to sectarian and denominational schools, thereby facilitating attendance at such schools, saving such schools the expense of themselves providing transportation for pupils, and releasing for other school purposes funds which would otherwise be employed by the schools for such transportation; and said legislation thereby materially supports and substantially benefits such schools.

"(b) Said purported legislation and expenditures violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act (Sections 1981, 1982, and 1983 of Title 42 of the United States Code) all made applicable to said Territory by Section 23 of Title 48 of the United States Code, in that said legislation appropriates public monies for and provides for the transportation of pupils to sectarian and denominational schools conducted not merely for educational purposes but also for the purpose of indoctrinating children in the particular dogma of the religious sect which conducts the schools. Said legislation thereby grants preferences to and aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion. Said legislation also thereby compels plaintiff and other taxpayers similarly situated to be taxed for the support and aid and assistance of, and indirectly to contribute money for the propagation of sectarian and denominational dogma and which they disbelieve, and therefore deprives plaintiff and said other taxpayers of their property without due process of law by

compelling them to pay taxes for and to contribute money for an unconstitutional purpose, to wit, the support and aid and assistance of a religious establishment.

"(c) Said legislation violates the Fourteenth Amendment to the United States Constitution and the said Civil Rights Act, made applicable to said territory as aforesaid, and contravenes the limitations of the Organic Act of said Territory, to wit, Section 77 of Title 48 of the United States Code, in that there is denied to plaintiff and the other taxpayers similarly situated the equal protection of the laws, and it is class legislation, and it is not uniform in operation, to wit, in that defendants will necessarily enforce said legislation by reason of its wording in a grossly disproportionate manner so as to constitute a deliberate and intentional discrimination against plaintiff and said other taxpayers by expending public money thereunder for the transportation of children to the schools of one particular sect of which plaintiff is not a member, which sect will, by comparison with the benefits received by other non-public schools, receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated."

Plaintiff concluded by alleging that he has no plain, speedy or adequate remedy at law and that the acts and intentions of defendants by enforcing and implementing said Legislation and by paying out public money for the transportation of pupils to sectarian and denominational schools will take property and property rights from plaintiff and said taxpayers and cause them irreparable loss. (Tr. 11.) Plaintiff

then prayed that the legislation be declared void, that the defendants be enjoined from carrying it into effect or from paying out territorial money or contracting for such transportation at public expense, and that plaintiff be awarded costs of suit. (Tr. 11-12.)

The gist of the foregoing allegations is a suit in equity by a territorial taxpayer to prevent the use of tax derived territorial funds for non-public purposes, namely, sectarian educational purposes—a use forbidden in express and detailed terms by the Organic Act of Alaska and also by the Federal Constitution.

The defendants moved the District Court for an order dismissing the complaint (Tr. 13) on the grounds that:

(a) It fails to state a claim against the defendants upon which relief can be granted and

(b) It does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public.

In ruling on defendant's motion to dismiss, the District Court filed an opinion which concedes that municipal and county taxpayers have universally been permitted to sue in equity to restrain an unlawful expenditure of city or county funds. (Tr. 19-20.) The Court also concedes that the great majority of Courts have upheld the right of state taxpayers to sue for an injunction against an unlawful expenditure of *state* funds. (Tr. 20.) *Finally, the Court below admitted that the right of a territorial taxpayer to sue in respect of territorial funds has been upheld in respect*

of the territories of Hawaii and Puerto Rico. (Tr. 20.) Yet it concluded that the Court of Appeals for the Ninth Circuit has ruled against such a right in respect of the Territory of Alaska. Relying on *Massachusetts v. Mellon,* 262 U.S. 447, and *Sheldon v. Griffin,* 174 F. 2d 382 (9th Cir., 1949), the District Court granted defendants' motion for dismissal. (Tr. 20-23.)

Subsequent to the filing of its opinion, the Court undertook to decide and rendered an additional opinion determining that attorneys' fees were properly allowable as costs to defendants as the prevailing parties even though they were represented by the Attorney General of Alaska. (Tr. 29-35.)

The Court then rendered judgment dismissing plaintiff's complaint and ordering that defendant (sic) recover attorneys fees in the amount of $250.00. (Tr. 24-25.) Plaintiff prosecutes this appeal from that judgment. (Tr. 26.)

QUESTIONS PRESENTED.

1. Whether plaintiff, as a taxpayer of the Territory of Alaska and those similarly situated, may sue through plaintiff to restrain territorial officials from making an unlawful or unconstitutional expenditure of territorial funds derived from taxes.

2. Whether attorneys' fees are properly allowable as costs to defendants as prevailing parties where they are represented by the Attorney General of the Territory but have paid him nothing for his services.

3. Whether plaintiff's complaint states a cause of action for injunctive relief against territorial officials by reason of their proposed expenditure of territorial funds for non-public school transportation, including to and from sectarian schools.

SPECIFICATION OF ERRORS.

1. The District Court erred in dismissing the complaint herein.

2. The District Court erred in ordering that a defendant recover attorneys' fees in the amount of $250.00, or in any amount.

3. The District Court erred in entering judgment for defendants, dismissing the complaint and ordering that a defendant recover attorneys' fees.

4. The District Court erred in finding and concluding that the complaint does not allege that the plaintiff and those similarly situated will suffer an injury that will not be suffered in common by the general public.

5. The District Court erred in finding and concluding that a plaintiff who alleges that he and those similarly situated are taxpayers of the Territory of Alaska and that territorial officials are about to make an unlawful and unconstitutional expenditure of territorial funds alleges no injury different from that of the general public, and makes no sufficient

showing as to a right to maintain the action, and suffers no direct or special injury entitling suit.

6. The District Court erred in not finding that plaintiff alleged a direct and special injury entitling him and those similarly situated to sue, and alleged an injury different from that of the general public, and made a sufficient showing of a right to maintain the action.

7. The District Court erred in finding and concluding that the action presents no justiciable controversy.

8. The District Court erred in concluding that it is the law of the Ninth Circuit that a plaintiff who alleges he and those similarly situated are territorial taxpayers and that tax-derived territorial funds are about to be unlawfully expended makes no showing sufficient to allow said taxpayers through him to sue in equity to restrain such an unlawful expenditure of territorial funds.

9. The District Court erred in not applying the rule of the First Circuit and the courts of Hawaii that a territorial taxpayer may sue to enjoin an unlawful expenditure of territorial funds.

10. The District Court erred in concluding that it was unnecessary to pass upon the question of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff.

11. The District Court erred in not finding that plaintiff and those similarly situated had alleged a

claim for relief on the grounds that an unlawful expenditure of territorial funds is involved.

ARGUMENT.

I. PLAINTIFF'S ALLEGATIONS CLEARLY ESTABLISH A JUSTICIABLE CONTROVERSY AND SHOW HIS RIGHT TO MAINTAIN THIS ACTION ON BEHALF OF HIMSELF AND THOSE SIMILARLY SITUATED. THE JUDGMENT OF DISMISSAL SHOULD THEREFORE BE REVERSED.

The real question here is whether plaintiff and those similarly situated have sufficiently shown a standing to sue when plaintiff alleges that they are territorial taxpayers who have directly contributed through territorial taxes to a fund which is about to be expended for a purpose expressly forbidden by the Organic Act and the Federal Constitution. We say the authorities are clear that they have. We also say that the Alaska District Court has twice in the last year misapplied the rule of *Massachusetts v. Mellon,* 262 U.S. 447, applicable only to United States taxpayers and congressional appropriations and has likewise misinterpreted the law of this Circuit as set forth in *Sheldon v. Griffin*, 174 F. 2d 382.

A. Plaintiff has shown that a direct and substantial pecuniary injury will result to himself and other territorial taxpayers similarly situated if the unconstitutional expenditures are allowed since the funds are derived directly from territorial taxes paid by plaintiff and said other taxpayers.

Plaintiff alleged that he and those similarly situated are citizen, resident, taxpayers of the Territory

of Alaska; and assessed for and liable to pay taxes to the Territory; and actually have paid territorial income taxes, school taxes, and license taxes. (Tr. 4.) He showed that the non-public school transportation expenses will be paid from funds appropriated for that purpose by the Legislature. (Tr. 6.) He showed that the Legislature has actually appropriated monies from the General Fund of the Territory for non-public school transportation, including sectarian schools. (Tr. 6-7.) He showed that the defendants intend to expend such appropriated funds for said non-public school transportation. (Tr. 7-8.) And, *plaintiff specifically alleged that these appropriated funds which will be so expended were obtained in part from the regular and special taxes paid by and required to be paid to said Territory by plaintiff and those similarly situated.* (Tr. 7.) He also pointed out that *such funds will thereby be lost from the Territorial Treasury and* that the *payment thereof will greatly increase said taxpayers' taxes.* (Tr. 8.)

In short, we are not merely dealing with a member of the general public; nor are we dealing with someone only remotely affected by the expenditure of territorial funds; nor are we merely dealing with territorial funds which are contributed by and held for a limited group of taxpayers or private individuals. We are dealing with the general fund of Alaska, derived directly from taxes paid by plaintiff and those similarly situated and being expended for a purpose forbidden by the Organic Act.

Plaintiff's interest and that of those for whom he speaks is not an etherial one based on convictions alone. He and they are taxpayers. They are compelled to supply the funds that have been illegally appropriated and will be wrongfully spent. Moreover their interest is not infinitesimal like that of a U. S. taxpayer who challenges a congressional appropriation. The population of the Territory of Alaska is less than 130,000 by the last official U. S. census. Thus the direct pecuniary interest of plaintiff and those similarly situated in and direct pecuniary loss from an unconstitutional expenditure of public funds is far, far greater than that of the taxpayers in hundreds of cities and counties who have universally been allowed to maintain taxpayer suits. It is 23 times greater than that of a Puerto Rican taxpayer and 5 times greater than that of a Hawaiian taxpayer—both of whom have been allowed to maintain taxpayer suits. It is over a hundred times greater than that of a taxpayer in many of the states which have ruled that a state taxpayer has a direct, pecuniary interest sufficient to entitle him to sue. Lastly, it is certainly no less than that of a stockholder in many of the large corporations whose stockholders have always been held to have sufficient interest to bring a suit to prevent waste of corporate funds.

It is therefore safe to say that, aside from direct authority and compelling policy reasons for allowing plaintiff and those similarly situated to bring this suit, there is ample showing of a direct, immediate, and substantial pecuniary loss resulting from an expen-

diture of the territorial funds to which they contribute.

B. There is strong and persuasive authority, directly in point, allowing territorial taxpayer suits in a case like this. Thus the Courts have allowed both Puerto Rican and Hawaiian taxpayers to bring suits against territorial officials.

The decision of the Circuit Court of Appeals for the First Circuit, in *Buscaglia v. District Court of San Juan,* 145 Fed. 2d 274, (1st Cir., 1944), *Cer. Den.* 65 Sup. Ct. 434, 323 U.S. 793, is directly in point. This case involved a suit by a Puerto Rican taxpayer against the Treasurer of Puerto Rico and others, to enjoin them from making any further allocation of insular funds for emergency relief purposes, on the ground that no valid legislative appropriation existed therefor. From an order of the Supreme Court of Puerto Rico RESTORING A RESTRAINING ORDER ISSUED BY THE DISTRICT COURT OF SAN JUAN, the defendants and intervenors appealed. The Circuit Court of Appeals for the First Circuit affirmed. Among other points on appeal the defendants raised the following:

> Does the plaintiff taxpayer Miro have some special interest of such nature as to qualify him to bring the proceedings for injunction, for which he has applied in the present case?

In considering this question on appeal, the Circuit Court of Appeals for the First Circuit said (145 F. 2d 283):

> "The three judges of the Supreme Court of Puerto Rico who sat on this case agreed that this

question is of a local nature. They disagreed, however, as to its answer. A majority of them, noting that the authorities were UNANIMOUS TO THE EFFECT THAT A MUNICIPAL TAXPAYER has standing to enjoin the illegal use of MUNICIPAL funds, that a FEDERAL TAXPAYER has no standing to do the same with respect to federal funds (*Commonwealth of Massachusetts v. Mellon,* 262 U. S. 447, 43 Sup. Ct. 597), and that there was a split in the authorities where state funds were concerned, were 'inclined to accept as more reasonable the rule LAID DOWN BY THE MAJORITY OF THE STATE JURISDICTIONS, which recognizes the right of the taxpayer to appear in a court of equity to stop the use, without prior legislative authorization therefor, of STATE FUNDS by executive officers of the state.' The majority then went on to say:

"'The recognition of that right is needed more in Puerto Rico than in state communities. In the latter, the executive chief or the chiefs of departments, if they act ultra vires or without authorization from the Legislature, and make illegal use of public funds, may be submitted to an "impeachment" proceeding and punished for their illegal act. IF in Puerto Rico, the legislature of which lacks authority to bring "impeachment" proceedings and whose high executive officers do not derive their authority and power from the consent of the governed, WE ADOPTED THE RULE FOLLOWED BY A MINORITY OF THE STATE JURISDICTIONS AND IGNORED THE FACT THAT THE MODERN TENDENCY IS IN THE DIRECTION OF ACKNOWLEDGING THE RIGHT OF THE

TAXPAYER TO SUE THOSE WHO MAKE ILLEGAL USE OF PUBLIC FUNDS, we would have to admit that in this jurisdiction the illegal act of making unauthorized use of public funds could be committed without there existing an efficient remedy to avoid or punish the same. We would have to confess that in Puerto Rico the legal maxim ubi jus, ibi remedium has no meaning.'

"The court below therefore held 'that petitioner taxpayer HAS THE NECESSARY STANDING AND INTEREST TO BRING THIS INJUNCTION PROCEEDING.' We are asked to reverse this holding on two grounds:

"First because it is patently erroneous, and second because the question is not a local but a federal one controlled by the decision of the Supreme Court in *Commonwealth of Massachusetts v. Mellon,* supra. WE DO NOT AGREE.

"If the question be one of local law we certainly cannot say that the Supreme Court of Puerto Rico fell into manifest error in ADOPTING THE RULE OF A MAJORITY OF THE HIGHEST STATE COURTS FOR THE REASON THAT THAT RULE WAS NOT ONLY SUPPORTED BY THE BETTER REASON BUT ALSO WAS PECULIARLY APPROPRIATE TO PUERTO RICO. The arguments rather half-heartedly advanced by the defendants in support of reversal on this ground are not of sufficient importance to warrant discussion.

"Their arguments in support of their second ground for reversal on this point cannot, however, be disposed of so summarily. In essence they say that in *Commonwealth of Massachusetts*

v. Mellon the Supreme Court of the United States decided that the constitutional doctrine of separation of powers prevents the courts from interfering at the behest of taxpayers with the action of executive officials, that the doctrine of separation of powers, as a matter of federal law, applies in Puerto Rico, and hence that the Supreme Court of Puerto Rico was not free to select its own rule and erred in refusing to follow the rule established in the case last cited (*Commonwealth of Massachusetts v. Mellon,* supra).

"We concede that the doctrine of separation of powers is implicit in the Organic Act of Puerto Rico as it is in the Philippine Organic Act . . . but we do not concede the rest of the defendants' argument . . .

"The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an individual taxpayer to the FEDERAL GOVERNMENT. The interest of such an individual, as affected by an alleged illegal expenditure of FEDERAL FUNDS, was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED; and despite any purely logical arguments which might be made from some of the language in *Commonwealth of Massachusetts v. Mellon,* WE HAVE NO DOUBT THAT IT IS WITHIN THE COMPETENCE OF THE TERRITORIAL GOVERNMENT, EITHER

BY LEGISLATIVE ACT OR JUDICIAL DECISION, TO AUTHORIZE A TAXPAYER'S BILL IN EQUITY IN A CASE LIKE THE PRESENT WITHOUT TRENCHING UPON THE DOCTRINE OF SEPARATION OF POWERS IMPLICIT IN THE ORGANIC ACT." (Emphasis supplied.)

Equally in point are three Hawaiian cases.

First, in *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii 80, plaintiff, a citizen and taxpayer of the Territory of Hawaii, brought suit against the Territorial Superintendent of Public Works, the Territorial Auditor, and others to restrain any expenditure of public funds for an allegedly illegal contract. The Circuit Judge of the First Circuit issued a perpetual injunction; and the Hawaiian Supreme Court affirmed the judgment on appeal, stating at 16 Hawaii page 86:

> "It is next contended that the plaintiff has no right as a taxpayer to maintain this suit. The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle, et al. v. Kapena,* 5 Haw. 27 (1883). If the question could be considered an open one we should follow the rule laid down in *Crampton v. Zabriske,* 101 U. S. 601, and in *R. P. R. R. Co. v. Hall,* 91 U. S. 343, cited in *Castle v. Kapena.* It is not necessary that the plaintiff should show actual damage to himself and to all others similarly situated, as is contended by the Assistant Attorney General. The cause of action is the alleged improper awarding of a contract, after a call for tenders based on indefinite specifica-

tions. If there has been a violation or evasion of the law requiring the awarding of the contract to the lowest bidder, after a public advertisement for tenders, damage is presumed to result to all taxpayers. The object of the suit is to prevent the violation of the law. The consequences which may result in case the law is disregarded are so obvious that no proof of actual pecuniary damage is necessary. In *Crampton v. Zabriske* the court on page 609 says: '* * * From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of the corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individaul taxpayers should not be entertained to prevent the misuse of corporate power.' The plaintiff comes within the rule, and no further showing as to damages is necessary under the facts in this case."

Again in *Castle v. Secretary of Hawaii,* 16 Hawaii 769, plaintiff sued as a taxpayer of the Territory of Hawaii to restrain the Secretary of the Territory from expending any money for a special election under authority of a statute which he said violated the Organic Act and other constitutional provisions.

The Supreme Court again upheld the right of the taxpayer to sue, stating at 16 Hawaii pages 774 and 776-777:

> "That the remedy sought by the plaintiff is available to him in his capacity as a citizen and taxpayer appears to be within the rule in *Castle, et al. v. Kapena,* 5 Haw. 27. * * *
>
> "The *Kapena* case was expressly affirmed in *Lucas v. American-Hawaiian Engineering & Construction Co.,* ante, p. 86, in which the court used the following language:
>
> " 'The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle, et al. v. Kapena,* 5 Haw. 27 (1883).'
>
> "We see no occasion to depart from this rule. The argument that a single taxpayer may not represent the wishes of the majority and that a question of public interest ought not to be adjudicated at his sole instance, with no opportunity for expression of opposing views, does not, in our opinion, affect his right to an adjudication. Any person, citizen or not, accused of an offense, may raise the question of the constitutionality of the law under which he is tried, and no one but himself and the prosecution is entitled to be heard upon it. Adjudicating the constitutionality of the act in advance of county organization avoids unnecessary expense and complication if the decision is adverse to the Act, and, if in its favor, furnishes desirable assurance of legal protection to those who shall be elected to county offices besides having burdensome and

expensive litigation in respect of matters so adjudicated.

"While equity has not jurisdiction to determine political rights but is confined to questions affecting rights of property, it appears to us that the case presented by the plaintiff in his capacity as a taxpayer comes within equitable jurisdiction for protection of property rights against acts of executive officers under unconstitutional statutes."

Finally, in the earlier case of *Castle v. Kapena,* 5 Hawaii 27, the Hawaiian Supreme Court denied a writ of mandamus to a plaintiff taxpayer but said that an *injunction* would lie to restrain territorial officials against the unlawful disbursement of funds or the illegal creation of a debt. The Court states at 5 Hawaii pages 34-35:

"It is said, for the respondent, that as the petitioners suffer no special and private injury, they cannot claim a standing in Court. There is authority for this position. Under some circumstances, it would be for the Attorney-General, or officer occupying an analogous position, to bring proceedings. In some cases, private parties, moving proceedings for mandamus or injunction, bring it in the name of the Attorney-General, and permission to do so is accorded as of course.

"*Merrill v. Plainfield,* 45 N. H. 126, may be cited as one of the cases supporting the right of individuals to bring action in a public matter; the Court saying that as the town by vote undertook to appropriate money in a manner unauthorized by law, any person who is a taxpayer in town, and liable to be assessed for any part

of such sum, may properly interfere to prevent its payment and misapplication, and granted a perpetual injunction.

"The principal objection to permitting suits to be brought by private taxpayers, is said to be the annoyance to public officers by a multiplicity of suits. The answer to this, as well as the doctrine in such cases, is set forth in a recent case in the Supreme Court of the United States, *Crampton v. Zabriskie,* 101 U. S. Reports, heard in 1879. We quote the language of Mr. Justice Field at large:

" 'Of the right of resident taxpayers to invoke the interposition of a Court of Equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State Courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great dangers of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for Courts of Equity to interfere, upon the application of taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. The Courts may be safely trusted to prevent the abuse of their process in such cases.' "

* * * * * * *

"It is apparent that if there is to be a proceeding in the case at bar, it must be brought

by some other person than the Attorney-General. The Attorney-General is bound by the statute defining his office to appear in defense of actions brought against Government officers. He does so in this case, and the respondent herein acts under the direction of the King in Cabinet Council, of which the Attorney-General is a member."

C. In an analogous situation where a state taxpayer sues to enjoin the illegal or unconstitutional expenditure of state funds, the great weight of authority allows such suit—and for good and compelling reasons.

It is equally well established in the great majority of states today that a taxpayer and, through him, those similarly situated may sue to enjoin *state* officials against an unlawful expenditure of *state* funds. Thus the Court says in *Herr v. Rudolph,* 75 N.D. 91, 25 N.W. 2d 916 at 919:

> "At the threshold of the case we are met by the defendants' challenge to the right of the plaintiff to institute this action. They say he has no legal capacity to do so and especially none to ask that state officers be restrained from acting pursuant to statutory direction and authority. This court, however, has often held that where public funds are about to be unlawfully expended a taxpayer in his own behalf and on behalf of his fellow taxpayers may challenge the proposed expenditure and invoke the powers of equity to prevent the officers about to do so from making it. (Citing cases.) It is true that these cases do not involve the expenditure of state funds but we can see no reason why the fact that the instant case does should render the rule there applied inapplicable here. (Citing cases.) We

therefore hold that the defendants' challenge must be overruled. Thus it becomes necessary to examine into the merits of the case."

The following cases clearly demonstrate that the great weight of authority is in accord with the *Rudolph* case where state officials and an illegal expenditure of tax-derived state funds are involved. They show also that the interest of such taxpayers is special and distinct from that of the general public.

Fergus v. Russell, 270 Ill. 304, 110 N.E. 130;

Castilo v. State Highway Commission, 312 Mo. 244, 279 S.W. 673;

Hill v. Rae, 52 Mont. 378, 158 Pac. 826;

Conway v. New Hampshire Water Resources Board, 89 N.H. 346, 199 A. 83;

Horvitz v. Sours, 74 Ohio App. 467, 58 N.E. 2d 405;

Funk v. Mullan Contracting Co., 78 A. 2d 632 (Md. Ct. of Appeals);

Page v. King, 285 Pa. 153, 131 Atl. 707;

Leckenby v. Post Printing & Publishing Co., 65 Colo. 443, 176 Pac. 490;

Green v. Jones, 164 Ark. 118, 261 S.W. 43;

Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W. 2d 174;

Ellingham v. Dye, 178 Ind. 338, 99 N.E. 1;

Terrell v. Middleton, 187 S.W. 367 (Tex. Civ. (App.);

Carrier v. State Administrative Board, 225 Mich. 571, 196 N.W. 182;

Johnson v. Gibson, 240 Mich. 515, 215 N.W. 333;

Teer v. Jordan, 232 N.C. 48, 59 S.E. 2d 359;
Gaston v. State Highway Dept., 134 S.C. 402, 132 S.E. 680;
Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963;
Democrat Printing Co. v. Zimmerman, 245 Wis. 406, 14 N.W. 2d 428;
Lipinski v. Gould, 173 Minn. 559, 218 N.W. 123;
Martin v. Ingham, 38 Kan. 641, 17 Pac. 162;
Stewart v. Stanley, 199 La. 146, 5 So. 2d 531;
Evanhoff v. State Industrial Accident Comm., 78 Ore. 503, 154 Pac. 106;
Spriggs v. Clark, 45 Wyo. 62, 14 P. 2d 667;
Goode v. Tyler, 237 Ala. 106, 186 So. 129;
Lyon v. Bateman, 228 P. 2d 818 (Utah Sup. Ct.);
Lyn v. Polk, 8 Lea. 121;
Caine v. Robbins, 61 Nev. 416, 131 P. 2d 516;
Wentz v. Dawson, 149 Okla. 94, 299 Pac. 493;
Livermore v. Waite, 102 Cal. 113, 36 Pac. 424;
Aiken v. Armistead, 186 Ga. 368, 198 S.E. 237.

D. It scarcely seems necessary to confirm that city and county taxpayers have universally been allowed to sue. In fact the Ninth Circuit has expressly upheld such a suit by an Alaskan taxpayer.

In *Crampton v. Zabriskie,* 101 U. S. 601, 25 L. Ed. 1070, the United States Supreme Court states the fundamental and universal rule which allows taxpayers to sue in equity to restrain the unlawful expenditure of city and county funds. Following this rule, the Ninth Circuit Court of Appeals held, in *Valentine v. Robertson,* 300 Fed. 521, that a taxpayer

of the City of Juneau could sue in equity to restrain the city treasurer and others from the unlawful expenditure of public money.

E. The Ninth Circuit has never ruled against the standing of territorial taxpayers to seek an injunction against the unconstitutional expenditure of territorial funds. The Court below clearly misconstrued and misapplied the case of Sheldon v. Griffin. That case dealt only with a fund made up of employer contributions, fines, and penalties and with a statutory amendment which this Court expressly declared added nothing to the burden of territorial taxpayers. Moreover, this Court's ruling in Valentine v. Robertson clearly paves the way for its adoption of the rule of the First Circuit and the Hawaiian cases allowing territorial taxpayers to sue in a case like this.

The history of suits by Alaskan taxpayers to enjoin illegal appropriations is as follows:

In the case of *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924), the plaintiff sued as a taxpayer to enjoin the Treasurer of the City of Juneau from expending public funds appropriated by the city to defray the expenses of a lobbyist. The lower Court held that such payments were lawful and refused to grant an injunction. The Ninth Circuit Court of Appeals reversed the judgment and remanded the cause to the trial Court with instructions to grant the injunction prayed for. Squarely ruling on the Alaskan taxpayer's right to sue, the Court said at 300 Fed. 525:

> "The appellees deny the right of the appellant as a taxpayer to invoke the aid of a court of equity to restrain an unlawful expenditure of the money of the city. Opposed to their contention is the well-settled rule of the federal courts.

> *Crampton v. Zabriskie,* 101 U. S. 601, 609, 25 L. Ed. 1070; *Mass. v. Mellon,* 262 U. S. 447, 486, 43 Sup. Ct. 597, 67 L. Ed. 1078; *Colorado Pav. Co. v. Murphy,* 78 Fed. 28, 23 C.C.A. 631, 37 L.R.A. 630. Likewise opposed to it is the almost universal rule of the Supreme Courts of the States, 19 R.C.L. 1163, and cases there cited."

Next, in the case of *Wickersham v. Smith,* 7 Alaska 522, the plaintiff Wickersham brought suit against the Treasurer of the Territory of Alaska to restrain him from paying out of the Territorial Treasury various sums of money which, he alleged, had been illegally appropriated by the Territorial Legislature. Plaintiff alleged that he was a taxpayer of the Territory, that the items complained of would be paid out of the Territorial Treasury by the defendant illegally, that the sums would thereby be lost from the public funds, and that their illegal payment would greatly increase the plaintiff's taxes. At the time of presenting his complaint, plaintiff moved for a temporary restraining order. The defendant interposed a demurrer, asserting that plaintiff had no capacity to sue and citing *Massachusetts v. Mellon,* 262 U.S. 487. After discussing certain of defendant's cases, the District Court drew an analogy between the status of a territory and that of a county—the territory depending for its existence upon the will of Congress in the one case and the county upon the will of the state legislature in the other, and neither being coequal in status with the courts. The Court then said that the point had not been argued and that it was unnecessary to pass upon it at that time. *But the*

District Court discussed the illegality aspects and granted the temporary injunction.

Next, in *Demmert v. Smith,* 82 F. 2d 950 (9th Cir., 1936), the plaintiff, as a taxpayer of the Territory of Alaska, sued to enjoin the Territorial Treasurer from disposing of certain public moneys appropriated by the Territorial Legislature for the benefit of the needy and indigent. Plaintiff alleged that the appropriations violated the equal protection clause by discriminating against Indian or Eskimo residents. A demurrer was interposed and sustained without leave to amend, and a judgment of dismissal was entered. On appeal, the Ninth Circuit Court of Appeals pointed out that plaintiff was neither an Eskimo nor an Indian and could only be affected as a taxpayer. The Court then went on to say that since the entire fund could be *properly and lawfully* expended if the unconstitutional portion were stricken, the plaintiff could not even claim injury as a taxpayer. The Circuit Court of Appeals, therefore, affirmed the lower Court and refused to consider the question of plaintiff's standing as a territorial taxpayer, saying at 82 F. 2d 952:

> "As to whether or not a taxpayer of Alaska, a Territory of the United States, can maintain a taxpayer's suit is a point that need not be decided in this case for reasons already pointed out and we refrain from expressing any opinion on that question."

The final case prior to 1955, and the only other case decided by the Court of Appeals, is *Sheldon v. Griffin,*

174 F. 2d 382 (9th Cir., 1949). There the plaintiff alleged that he was a citizen and taxpayer of Alaska and brought suit against the Executive Director and other members of the Unemployment Compensation Commission of Alaska. The plaintiff sought to prevent the Unemployment Compensation Commission from giving effect to a recent amendment of the Unemployment Compensation Code. The amendment provided for a system of credits to be granted qualified employers on an experience merit basis and also reduced the waiting period from two weeks to one week before benefits could be claimed by unemployed persons. Plaintiff challenged the validity of the amendment for asserted irregularities in the course of the bill's passage. The District Court found that the bill had not been given a third reading in the House as required by the Organic Act, and granted the injunctive relief prayed for. However, this Court reversed the judgment, saying:

> "In his complaint the plaintiff alleged merely that he is a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA. The unemployment compensation FUND administered by the Commission IS MADE UP OF CONTRIBUTIONS EXACTED FROM EMPLOYERS in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. Alaska Compiled Laws 1949, Section 51-5-5. There is nothing in the pleading or proof

> to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Emphasis ours.)

The simple and clear holding of *Sheldon v. Griffin* is that the plaintiff—though alleging he was a taxpayer—*was not affected* AS A TAXPAYER. The funds in question were not derived from territorial taxpayers as such, but were collected from the employers alone. The Court of Appeals for the Ninth Circuit plainly says at 174 F. 2d 383:

> "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA."

Hence its ruling that the taxpayer had suffered no injury entitling him to sue.

Our case is far different. Territorial funds collected from territorial taxpayers are involved. The statute here does add substantially to the burden of the taxpayers of Alaska. Plaintiff and those similarly situated do suffer injury AS TAXPAYERS.

Returning to the case of *Sheldon v. Griffin,* it must be observed that the Court of Appeals did not rule

upon a case like ours. Nor was it asked to. This is clear from the fact that the Court discussed no authorities involving the right of a taxpayer to enjoin illegal expenditure of territorial funds. Thus it did not discuss the case of *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir. 1944), *Cer. Den.* 65 S. Ct. 434, directly upholding such right. Nor did it discuss the Hawaiian cases, *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii 80; *Castle v. Secretary of Hawaii,* 16 Hawaii 769; and *Castle v. Kapena,* 5 Hawaii 27, directly upholding such right. Nor did it discuss the ninth circuit cases we have analyzed above. The reason, of course, is that it did not have that kind of a case. No added burden to taxpayers was involved. No territorial, tax-derived fund was involved. And no territorial taxpayers were injured as such.

We, therefore, say unhesitatingly that as of this date, the Court of Appeals for the Ninth Circuit has never determined that territorial taxpayers may not sue to enjoin an illegal expenditure of territorial funds.

The District Court of Alaska erroneously concluded in *Shelton v. Wade,* 130 F. Supp. 212 (D. C. Alaska, 1955), and in our case that the point had been decided in this Circuit. But it should be noted that the District Court in *Shelton v. Wade,* supra, did not analyze the *facts* in *Sheldon v. Griffin,* 174 F. 2d 382. Nor did it discuss the fact that no tax-derived funds were involved in the *Sheldon* case. *Nor did it refer to the plain statement in the Sheldon case*

that the amendment there added nothing to the burden of the taxpayers of Alaska. Nor did it discuss taxpayer cases directly in point, such as *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924); *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir., 1944), *Cer. Den.* 65 S. Ct. 434; and the Hawaiian cases. Finally, it *did not* discuss that the vast body of state authorities allowing suit by city, county and state taxpayers.

In our case, the District Court in its opinion conceded that Puerto Rican, Hawaiian and state taxpayers are allowed to sue. It nevertheless felt itself precluded by the case of *Sheldon v. Griffin,* supra, and assumed that the *Sheldon* case rested on the doctrine of separation of powers enunciated in *Massachusetts v. Mellon.* But the difficulty with the trial Court's erroneous assumption is that the Court of Appeals never once mentioned this factor in its decision of the *Sheldon* case. And it *did* specifically point out that the plaintiff there had suffered no injury as a taxpayer because no added tax burden was involved.

In short, it seems clear to us that the Court of Appeals in the *Sheldon* case cited *Massachusetts v. Mellon* for a particular point—to show that where there is no justiciable controversy, there can be no suit. And the Court of Appeals held that a taxpayer shows no justiciable controversy where no added tax burden is involved. The Court plainly states this point.

In conclusion, therefore, we emphasize (1) the clear holding in *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924). There the Court of Appeals for this circuit

unhesitatingly relied upon the many federal and state cases allowing municipal and county taxpayers to sue. (2) As we have demonstrated in preceding sections, the great majority of state courts have applied this same rule in allowing state taxpayers to sue in respect of state funds. (3) Finally, in four well-reasoned decisions, the Court of Appeals for the First Circuit and the Hawaiian Courts have applied the same rule to territorial taxpayers. (4) Moreover, as Judge Reed pointed out in *Wickersham v. Smith,* 7 Alaska 522, the situation in the Territories is more like that of counties. For, in the Territories, one deals with legislative bodies which exist at the will of Congress, are limited by the laws of Congress, and are not co-ordinate branches of government. And the federal courts should stand as guardians of the law—just as state courts stand as guardians of the law in respect of county and municipal governments which exist at the will of and are limited by state laws.

We have set forth above an analysis of the *Buscaglia* case decided by the First Circuit. We do urge a study of that decision for a thorough, timely, well-reasoned application to the Territories of the taxpayer doctrine. And we urge that this Court should follow the lead of its own decision in *Valentine v. Robertson,* 300 Fed. 521, and apply the well-reasoned decisions in the First Circuit and the Hawaiian Courts.

F. The lower Court has misapplied the rule of Massachusetts v. Mellon. We are not merely dealing with the infinitesimal relationship of a lone federal taxpayer to the Federal Treasury in respect of a nationwide appropriation. Our taxpayer plaintiff and those similarly situated for whom he speaks urge a case involving the relatively few residents of Alaska, the even smaller number of taxpayers there, and the direct and substantial addition to their tax burden caused by illegal expenditures. These taxpayers need judicial safeguards against violations of the organic law and of the Federal Constitution.

In the states, our city and county governments are limited in their actions by the state "organic act"—the constitution. They are limited as well by the prohibitions of the state legislature. And the state courts stand as guardians against any actions by city and county officials in violation of these organic and legislative prohibitions. This principle was well recognized by the United States Supreme Court in *Massachusetts v. Mellon,* when it said at 67 L. Ed. 1085:

> "The case last cited came here from the court of appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield,* 12 App. D.C. 453, 459, 460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court."

In the *Mellon* case itself, however, the court was concerned with a taxpayer of the United States who was challenging a federal appropriation. He claimed his interest in the moneys of the U. S. Treasury was sufficient to entitle him to sue. The Supreme Court expressed concern that federal courts should not thus open the flood gates to millions of taxpayers who might challenge all sorts of federal appropriation statutes. Moreover, it called attention to the co-equal status under the Federal Constitution of the Executive Branch and the Supreme Court. These two considerations differentiated that case sharply from suits by city, county, and even state taxpayers. That was meat of the decision. The Supreme Court said at 67 L. Ed. 1085:

> "But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—IS SHARED WITH MILLIONS OF OTHERS; IS COMPARATIVELY MINUTE AND INDETERMINABLE; AND THE EFFECT UPON FUTURE TAXATION OF ANY PAYMENT OUT OF THE FUNDS SO REMOTE, FLUCTUATING and UNCERTAIN that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> "The administration of any statute likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. IF ONE TAXPAYER MAY

CHAMPION AND LITIGATE SUCH A CAUSE, THEN EVERY OTHER TAXPAYER MAY DO THE SAME, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. THE BARE SUGGESTION OF SUCH A RESULT, WITH ITS ATTENDANT INCONVENIENCES, GOES FAR TO SUSTAIN THE CONCLUSION WHICH WE HAVE REACHED, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-Federal purposes have been enacted and carried into effect.

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson,* 7 Wall. 347, 19 L. Ed. 62. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justifi-

cation for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.

* * * * * * *

"If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess." (Emphasis added.)

Our case does not involve these considerations.

The total number of Alaska's residents is less than that of a large county. The total number of its territorial taxpayers would probably equal the number of taxpayers in a middle-class city. So we are talking about a relatively small group of taxpayers with a direct, immediate, well-defined, and substantial interest in the Territorial Treasury.

Neither the Alaskan Legislature nor Alaskan officials occupy the same relationship to the Federal Courts that Congress or the President occupy to the Supreme Court. The Organic Act was passed by a higher authority—Congress. The Federal Courts were established by a higher authority—Congress. Both are guardians against the excesses of territorial officials; and a taxpayer's suit in equity is the common, sound way of obtaining redress against such excesses. The situation in Alaska presents a need for taxpayer's suits similar to that of the cities, counties, states, District of Columbia, and other territories where such suits are universally recognized and allowed.

The lack of similarity in our case to the case of *Massachusetts v. Mellon* is brought into clear focus by the *Buscaglia* decision where the First Circuit states at 145 F. 2d 283-284:

> "The recognition of that right is needed more in Puerto Rico than in state communities. In the latter, the executive chief or the chiefs of departments, if they act ultra vires or without authorization from the Legislature and make illegal use of public funds, may be submitted to an 'impeachment' proceeding and punished for their illegal act. If in Puerto Rico, the legislature of which lacks authority to bring 'impeachment' proceedings and whose high executive officers do not derive their authority and power from the consent of the governed, we adopted the rule followed by a minority of the state jurisdictions and ignored the fact that the modern tendency is in the direction of acknowledging the right of the taxpayer to sue those who make illegal use of public funds,

we would have to admit that in this jurisdiction the illegal act of making unauthorized use of public funds could be committed without there existing an efficient remedy to avoid or punish the same. We would have to confess that in Puerto Rico the legal maxim ubi jus, ibi remedium has no meaning.

The court below therefore held 'that petitioner taxpayer has the necessary standing and interest to bring this injunction proceeding.' We are asked to reverse this holding on two grounds: First because it is patently erroneous, and second because the question is not a local but a federal one controlled by the decision of the Supreme Court in *Commonwealth of Massachusetts v. Mellon,* supra. WE DO NOT AGREE."

* * * * * * *

"In *Commonwealth of Massachusetts v. Mellon,* the Supreme Court decided as a question of first impression that a federal taxpayer's interest in monies in the United States Treasury is shared with so many others, is so comparatively minute and indeterminable, 'and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.' [262 U.S. 447, 43 S. Ct. 601, 67 L. Ed. 1078] Then on grounds of public policy it reinforced its conclusion that a federal taxpayer, unlike a municipal one with respect to municipal funds, has no standing to seek an injunction against an alleged illegal expenditure of federal funds, and then said that when no justiciable controversy was before it, the doctrine of separation of powers prevented it from interfer-

ing with the action of executive officials on the ground that the statutes under which they were acting were unconstitutional. It said: 'We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.' The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an individual taxpayer to the Federal Government. The interest of such an individual, as affected by an alleged illegal expenditure of federal funds, was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED; and despite any purely logical arguments which might be made from some of the language in *Commonwealth of Massachusetts v. Mellon,* we have no doubt that it is within the competence of the territorial government, either by legislative act or judicial decision, to authorize a taxpayer's bill in equity in a case like the present without trenching upon the doctrine of separation of powers implicit in the Organic Act." (Emphasis ours.)

In discussing the right of taxpayers to sue state officials, the following additional light is cast in 52 *Am. Jur.* Taxpayers' Actions, page 5.

"[T]he real basis of the rule permitting suit by the individual taxpayer is the necessity of prompt action to prevent irremediable public injury; this

reason applies equally as well where STATE funds are being misappropriated, and if jurisdiction can be sustained in one case it should be in the other, JUST AS THE MAJORITY OF COURTS HOLD THAT IT CAN BE. The municipal or county taxpayer is allowed to maintain the suit, not because of an individual interest differing from other taxpayers, but because, as such taxpayer, he is so interested in the municipal funds that he may ask the court to protect them from misuse or misappropriation; the taxpayer bears the same relation to the STATE funds as to the MUNICIPAL funds, except in degree, a point which should not enter into the question. In other words, it is the pecuniary interest of the taxpayer that gives him the right to sue, not the character of the officer whom he seeks to restrain, and not necessarily the supposed analogy which his position as a municipal taxpayer bears to that of a stockholder in a private corporation. This latter view, it is submitted, merely furnishes a theoretical basis for a rule which, without such theoretical basis, runs somewhat contrary to the general understanding of the principles of equity with respect to who may maintain injunction; but it seems better to treat the rule with respect to taxpayers' actions AS AN EXCEPTION TO THE GENERAL EQUITY PRINCIPLES, FOUNDED ON THE NECESSITIES OF THE CASE, THAN TO ATTEMPT TO PLACE IT UPON A LOGICAL, THEORETICAL BASIS." (Emphasis added.)

We say that the Court below has misapplied the rule of *Massachusetts v. Mellon* by trying to draw

an analogy between federal taxpayers who number in the tens of millions and Alaskan taxpayers who number less than one hundred thousand. In Alaska, the same pressing reasons for giving taxpayers assistance exists as in the case of city, county and state taxpayers. And the compelling policy considerations against suits by United States taxpayers—resting on principles of limiting federal jurisdiction and maintaining Federal Separation of Powers—simply do not exist in the case of Territorial District Courts.

The fact that *Massachusetts v. Mellon* is frequently cited for the proposition that a plaintiff does not present a justiciable controversy if he does not suffer an injury different from the general public certainly does not justify the conclusion that the case bars taxpayer suits. The case specifically points out that taxpayer suits—other than those by United States taxpayers—have long been upheld in all Courts.

In short, when *tax-derived* public funds are being spent, a *taxpayer*—other than a United States taxpayer—does have a direct, substantial and immediate pecuniary interest in the tax funds being expended. His interest, being substantial and pecuniary, is obviously different from that of the general public. And in our case the taxpayer plaintiff is speaking for himself and those similarly situated.

G. In summary, plaintiff and those similarly situated have shown that they are taxpayers who have a direct, immediate, and substantial pecuniary interest in the tax-derived territorial funds being expended. On the authority of the territorial, state, county, and city taxpayer cases, they should be allowed to sue. Both the case of Massachusetts v. Mellon and the Ninth Circuit decisions comprehend just such a suit as this.

The trend of modern state Court decisions is certainly to allow any taxpayer to sue to prevent unlawful diversion of public funds—city, county or state. See 18 *McQuillin, Municipal Corporations,* (3rd Ed) §52.04, and *Aiken v. Armistead,* 198 S.E. 237, 246.

The situation in the Territory of Alaska—as to number of taxpayers, the need for allowing taxpayer suits, and the status of Territorial officials—is certainly no different than that in our cities and counties where taxpayer suits are universally allowed. It is little different than that in our states where the overwhelming majority of Courts permit taxpayer suits. But the situation is entirely different than that involving the hundred million taxpayers of the United States Government who, for entirely different policy reasons, are not allowed to use the separate and co-ordinate Judicial Branch to challenge the constitutionality of Congressional appropriations.

Plaintiff therefore sincerely urges that this Court follow the lead of the cases allowing such suits in other territories, that it follow the great weight of authority in the state Courts, and that it follow, as well, the principle enunciated in its own decision of *Valentine v. Robertson,* 300 Fed. 521. It should rule that a Territorial taxpayer may sue on behalf of himself and those similarly situated to restrain an unlawful or unconstitutional expenditure of Territorial funds.

II. THE ONLY JUSTIFICATION FOR ALLOWING ATTORNEY'S FEES IS BY WAY OF INDEMNIFICATION FOR COSTS. DEFENDANTS MADE NO SHOWING THAT THEY HAD PAID OR WOULD BE REQUIRED TO PAY THE ATTORNEY GENERAL ANY COMPENSATION FOR LEGAL SERVICES. THE DISTRICT COURT THEREFORE HAD NO AUTHORITY TO MAKE SUCH AN AWARD.

Section 55-11-51 ACLA 1949 provides:

> "*Compensation of Attorneys.* The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums *by way of indemnity* for his attorney fees in maintaining the action or defense thereto, *which allowances are termed costs.*" (Emphasis ours.)

Rule 54 (d), Federal Rules of Civil Procedure provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

The allowance of attorney fees as costs is within the discretion of the Court. *Alameda, et al., v. Paraffine Companies,* 169 F. 2d 408, 409 (9th Cir., 1948.)

In this case, the Territory of Alaska is not a party. The Attorney General, who represents the defendants, is a salaried official of the Territory. The defendants sought to be restrained are all salaried officials of the Territory. They have incurred no expense whatsoever in their defense of this action.

The Alaskan statute (55-11-51) provides for an attorney's fee "by way of *indemnity* in maintaining the

action or defense thereto," which allowance is termed a cost. This precludes an attorney's fee where there is nothing to indemnify. As we have heretofore pointed out, the Territory of Alaska, which pays the salary of the Attorney General and, for that matter, of all the defendants, is *not a party.*

Who is the party to be *indemnified?* Certainly not the Territory of Alaska which is not a party; certainly not the defendants who have incurred no expense in the action; and certainly not the salaried Attorney General. The trial Court, therefore, erred prejudicially in requiring plaintiff to pay an attorney's fee to an unspecified "defendant" (Tr. 25) who incurred no expense.

III. PLAINTIFF'S COMPLAINT STATES A CLAIM FOR INJUNCTIVE RELIEF ON THE GROUND THAT NON-PUBLIC SCHOOLS THAT EXIST PRIMARILY FOR A NON-PUBLIC PURPOSE, NAMELY, TO TEACH SECTARIAN AND DENOMINATIONAL DOCTRINE, WILL BE DIRECTLY SUPPORTED AND MATERIALLY BENEFITED BY THE CHALLENGED LEGISLATION. THE DISTRICT COURT ERRED IN NOT PASSING ON THE CONSTITUTIONAL QUESTIONS, IN NOT FINDING THAT A CLAIM FOR RELIEF WAS STATED, AND IN DISMISSING THE COMPLAINT.

Plaintiff set forth ample facts to establish a justiciable controversy and his standing to sue as a taxpayer. The District Court therefore erred in not passing on the merits of the complaint and in not finding that a claim for relief was stated. It therefore erred as well in not denying the motion to dismiss the complaint.

A. The Organic Act expressly forbids the appropriation of public money for the support or benefit of sectarian schools. Plaintiff alleged that public money will go directly to subsidize, support, and benefit non-public sectarian schools by supplying their transportation needs at public expense. There are many recent decisions squarely holding such legislation unconstitutional under state constitutional provisions almost identical to those of the Organic Act.

The Organic Act of the Territory of Alaska and, in particular, Section 77 of Title 48 of the United States Code provides in part as follows:

> "... nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school or any school not under the exclusive control of the Government ..."

It is, of course, clear that the Alaska Legislature may not contravene the Organic Act. *Alaska Fish Salting & By Products Co. v. Smith,* 255 U.S. 44, 65 L. Ed. 489.

It is equally clear from the provision quoted above that the Organic Act prohibits any appropriations of territorial funds for either the support or the benefit of any sectarian or denominational or other non-public school.

Since plaintiff alleged that appropriations of territorial funds have been made and will be expended for transportation of pupils to sectarian and denominational schools, the simple question here is:

> *Does an appropriation of territorial funds for the transportation of pupils to sectarian schools either support or benefit such schools?*

If so, for this conclusive reason, plaintiff's complaint should not have been dismissed.

Plaintiff contends that appropriations providing for transportation of parochial school pupils at public expense obviously support and benefit the schools in question.

It is no secret that sectarian schools seek to draw pupils away from our public schools. It is the aim of sectarian schools to fuse and combine secular and religious education. In fact, church law often forbids attendance at public schools and requires enrollment in church conducted schools. Thus sectarian schools compete with the public schools. The public schools are provided by the state and are open to all on equal terms and are proscribed from sectarian teaching. There is therefore a vast difference between the sectarian purpose of a sectarian school and the public purpose of a public school. See 67 S. Ct. 504, 514-515.

A major impediment to the success of this sectarian competition is lack of transportation.

If a potential pupil of a particular sect lives at a point quite distant from the church conducted school, he is, of course, far more likely to go to the public school to which free transportation is provided. Similarly, if the church conducted school is located at a point distant from a particular population area, the potential pupil is more apt to attend the public school located nearby. It is therefore obvious that transportation supplies the vital factor necessary to the successful location, existence, growth and *competition* of

the sectarian school. Transportation is therefore a vital, and not incidental, aid and benefit and support for sectarian schools.

Transportation *at public expense* is an extremely valuable benefit. It facilitates attendance. It encourages the pupil to avail himself of sectarian schools. It saves the church the money it would normally expend for such purpose. And it makes such funds available for other sectarian purposes. The support and benefit is therefore clearly and directly *financial.*

Hence, appropriations for transportation violate the "no support or benefit" provisions of the Organic Act. And Courts which have been asked to rule upon the constitutionality of such appropriations in the face of similar constitutional prohibitions have overwhelmingly struck down the appropriations as violating the letter of the constitution and the principle of separation of church and state embodied therein.

A very recent authority is *Visser v. Nooksack Valley School Dist. No. 506,* 33 Wash. 2d 699, 207 P. 2d 198. There plaintiff brought a mandamus proceeding to compel public officials to allow sectarian school pupils to use public school transportation facilities. *A taxpayer intervened successfully to resist.* The Washington statute directed that public transportation be provided to sectarian school pupils. But Article I, Section 11 of the Washington Constitution provided:

> "No public money or property shall be appropriated for or applied to any religious worship, ex-

> ercise or instruction, or the support of any religious establishment."

The Court therefore pointed out at 207 P. 2d 198, page 201, that "The Police power—broad and comprehensive as it is—cannot be exercised in contravention of plain and unambiguous constitutional inhibition". And in striking down the transportation statute, the Court had this to say at 207 P. 2d 198, 203:

> "The question of constitutionality of the statute thus resolves itself to this: Does school bus transportation to or from religious, or sectarian, schools constitute support or maintenance of such schools?
>
> "Transportation to or from school differs, in both degree and nature, from those indirect, incipient and incidental benefits which accrue to schools, as buildings, or to its pupils, as citizens, under normal health, welfare, and safety laws of the state. In both inception and operation of schools, transportation thereto and therefrom is a vital and continuous financial consideration. Any private, religious, or sectarian schools which are founded upon, or fostered by, assurances that free public transportation facilities will be made available to the prospective pupils thereof, occupy the position of receiving, or expecting to receive, a direct, substantial, and continuing public subsidy to the schools, *as such,* thus encouraging their construction and maintenance, and enhancing their attendance, at public expense.
>
> "The following paragraph, taken from *Judd v. Board of Education,* 278 N.Y. 200, 211, 15 N.E. 2d 576, 118 A.L.R. 789, as quoted with approval

in the Mitchell case (*Mitchell v. Consolidated School District No. 201,* reported in 17 Wash. 2d 61, 135 P. 2d 79, 146 A.L.R. 612) expresses our view with reference to the case at bar: 'The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law, but rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. "It helps build up, strengthen and make successful the schools as organizations" [citing cases]. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. In the instant case, $3,350 was appropriated out of public moneys solely for the transportation of the relativity few pupils attending the specific school in question. If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases, it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school.'

"Our answer to the question above propounded may well be couched in the language used in the majority opinion in the *Mitchell* case, supra:

> 'We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question.' "

See also *Gurney v. Ferguson,* 190 Okl. 254, 122 P. 2d 1002, *Cer. Den.* 317 U.S. 588; *Judd v. Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576; *State ex rel. Traub v. Brown,* 6 W.W. Harr., 36 Del. 181, 172 Atl. 835, *writ of error dismissed,* 197 Atl. 478; *Berghorn v. Reorganized School Dist.,* 260 S.W. 2d 573 (Missouri); *McVey v. Hawkins,* 258 S.W. 2d 927 (Missouri); and *State v. Milquet,* 180 Wis. 109, 192 N.W. 392.

From the foregoing cases, it can be seen that while the Federal Constitution prohibits a "law respecting an establishment of religion," most state constitutions and organic acts go, and were intended to go, much farther. As is said in an excellent note in 33 *Cornell Law Quarterly* 122 at page 124:

> "Several state constitutions forbid an establishment of religion in terms similar to those of the First Amendment; *most have more specific provisions against the use of public money in support of, or the compulsory support of, religious sects or institutions, the appropriation of funds for sectarian schools,* or the giving of any preference to one sect over others."

See also II *Cooley's Constitutional Limitations* 966.

Historically, the First Amendment grew out of the keen desire of our people to end the church-state unity

and the oppressive church practices that prevailed in the colonies. But it antedated a new problem in the field of church-state separation which grew out of the rise of the non-sectarian public school system. For with the origin, growth and development of the public school system certain churches sought more and more to obtain public funds and support for the competitive, sectarian school system. See *Illinois Ex Rel. McCollum v. Board of Education,* 333 U. S. 203, 214. These efforts are described as follows in the *Everson* case, 330 U.S. 1, 63:

> "Two drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. *The other, to obtain public funds for the aid and support of various private religious schools.*" (Emphasis ours.)

The sectarian drives for public funds to support the competitive, sectarian school system have been on the state and territorial level. It is, therefore, not surprising to find that our state constitutions and territorial organic acts have been far more specific than the First Amendment in dealing with the problem of sectarian school support. As certain churches have increased their demands for public subsidies in the field of sectarian education, so also have state and territorial organic provisions become stronger and more explicit in their prohibitions. They have recognized the threats to the church-state American doc-

trine. As was said in the *McCollum* case, 333 U.S. 203, 214:

> "*The upshot of these controversies,* often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, *the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.*
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> * * * * * * *
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> "So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education, *such as had been written into many state constitutions.*
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> * * * * * * *
>
> "The extent to which this principle was deemed a presupposition of our constitutional system *is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'* " (Emphasis ours.)

Our point is that the words of the Alaska Organic Act—strongly and comprehensively prohibiting any *support or benefit*—were intended to resist and restrain *any and all* methods by which sectarian education would receive public funds or public support. The pervasive language of the Alaska Organic Act, like

that in many other state constitutions, was inserted because of a firm resolve of our people that they would never be required to be taxed for, contribute to, give aid to, confer benefit upon, or otherwise support sectarian education or sectarian schools.

Dealing with such language found in the Alaska Organic Act, the state courts, therefore, have held that the prohibition means just what it says—*no support.* No support by outright payment. No support by providing buildings. No support by transferring property. No support by paying tuitions. *And no support by providing transportation.*

Publicly supported sectarian school transportation is obviously one of the supports that the Organic Act was intended to prevent. It is precisely what it should prevent. Sectarian education, sectarian buildings, sectarian property, and sectarian transportation are all one program. One is the "camels foot in the tent" to the other. If a particular sect commands that its devotees attend the schools of that sect, rather than the state provided public schools which ban sectarian teaching, then that sectarian educational program must be at private expense. Public schools and the means of access thereto are free and open to all on equal terms and are provided at public expense for the express purpose of promoting and expanding our public school system. As was pointed out in the *McCollum* case, 333 U.S. 203, 231:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."

Competitive, sectarian schools, that teach subjects proscribed to the public schools, and the means of access to such competitive sectarian schools, were never intended to be promoted or expanded at public expense. Such promotion and expansion is expressly prohibited in word and in principle by Section 77 of the Organic Act.

Plaintiff therefore clearly stated a cause of action to restrain these expenditures for the support of sectarian schools.

B. Plaintiff has also stated a claim for relief under the Federal Constitution and under other provisions of the Organic Act.

Plaintiff alleged that an unlawful and unconstitutional diversion of public funds is involved here for the further reasons: (1) that a law appropriating money for sectarian school transportation grants a preference to, aids, and supports sectarian and denominational schools and therefore constitutes a law respecting an establishment of religion; (2) that such a law compels plaintiff and those similarly situated to be taxed for the support, aid, and assistance of sectarian education and therefore deprives them of due process of law by taxing them for an unconstitutional and non-public purpose; and (3) that such a law is unequal, class legislation, and non-uniform in that one particular sect of which plaintiff and those similarly situated is not a member will receive a grossly disproportionate benefit therefrom in terms of both the pupils and the schools accommodated.

Such allegations squarely raise issues of unconstitutionality under: (1) The First Amendment pro-

hibiting laws respecting an establishment of religion; (2) The Fifth Amendment prohibiting deprivation of due process; (3) The Fourteenth Amendment prohibiting denial of due process and equal protection; (4) The Civil Rights Act (Sections 1981, 1982, 1983 of Title 42 U.S.C.A.) protecting against such intrusions; (5) Section 23 of Title 48 of the United States Code making these provisions applicable to the Territory of Alaska; and (6) Section 77 of Title 48 of the United States Code prohibiting non-uniform laws and class legislation.

As is shown in *Alaska Steamship Co. v. Mullaney,* 180 F. 2d 805, 817 (9th Cir., 1950), the limitations in the Federal Constitution are either directly applicable to acts of the territorial legislatures or, in any event, are made applicable by 48 U.S.C., Section 23. And as previously stated, the Legislature, of course, cannot contravene the Organic Act.

An appropriation of money for transportation of pupils to sectarian schools clearly breaches the vital principle of separation of church and state embodied in the First Amendment of the United States Constitution. Despite *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, a split 5-4 decision, the very language used by the majority in that case and in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, plus the convincing language of the four dissenting judges, plus the recent manifestations of the sectarian school drive for public funds, convince that a contrary result would be reached if the matter were presented today.

Recall the pervasive declaration by the *majority* judges in the *Everson* case at 330 U.S. 15-16:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups, and vice versa. *In the words of Jefferson, the clause against establishment of religion by laws was intended to erect 'a wall of separation between Church and State.'* "

The following analysis in an excellent law review article in 45 *Mich. L. Rev.* 1001, 1017 gives strength to the belief that the Supreme Court today would recognize that transportation appropriations do constitute aid within the meaning of the Federal establishment of religion clause:

> "The minority justices took issue both broadly and specifically with this treatment of the problem. The fundamental objection was that the pub-

lic welfare concept was completely inappropriate to a determination of the 'establishment of religion' question. Justice Rutledge stated the proposition in this way:

> 'Our constitutional policy * * * does not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.'

"Thus, whenever legislation in fact aids or promotes religious teaching or observances, it falls within the area forbidden by the 'establishment of religion' clause, notwithstanding that it might be sustained under the Fourteenth Amendment if the religious element were absent.

"The specific issues drawn by the minority justices substantiate their basic critique. Transportation is an essential cost of modern education; once the public welfare analysis is permitted, the way is opened for additional assistance, tendered perhaps to the individual, but in fact aiding the school. 'Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings,

equipment and necessary materials. Nor is it any less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve.'

"Neither does the public safety argument of the majority stand up under the scrutiny of the minority. As has already been observed, the statute and resolution lack the essential elements of safety legislation, since they did not alter the pre-existing mode of transportation. Moreover, as Justice Jackson pointed out, the Court's analogy to police and fire protection is invalidated by the religious test which determined whether reimbursement for transportation was to be made.

"The suggestion of the majority that failure to include parochial schools in the transportation plan would amount to discrimination against them was met by the argument that such discrimination is in fact required by the First Amendment as the price of religious freedom. Indeed an arrangement which provided for the transportation of all school children and thus satisfied the equal protection argument discussed earlier herein would still be invalid to the extent that it authorized aid to parochial schools. 'For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no

creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed.'

"Summing up the division between the majority and minority on the 'establishment of religion' question, it seems to the writer that substantial and persuasive arguments support the minority position. No argument advanced by the majority meets the fundamental objection that legislation which in fact aids religion or religious institutions, directly or indirectly, is an establishment of religion. The public welfare argument, introduced in connection with the non-religious due process question, served but to obscure the underlying issues so clearly pointed out by Justice Rutledge. Further, discrimination against religious institutions in the gratuitous distribution of public funds is commanded by the Constitution. And, solidly supporting the minority's insistence on a broad interpretation of the 'establishment of religion' clause, is the proposition that in cases involving the fundamental freedoms of the First Amendment the usual presumption of constitutionality is unavailing to save even the least infringement upon them."

That this viewpoint of the minority is likely to be adopted is further sustained by the persuasive discussion in *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 207 P. 2d 199, 204-205:

"Appellants have placed great reliance on the principles announced in *Everson v. Board of Ed-*

ucation, 330 U.S. 1, 67 S. Ct. 504, 507, 91 L. Ed. 711, 168 A.L.R. 1392, which was a five-to-four decision. While that case holds, on its facts, that the incidental furnishing of free public transportation to parochial schools is not an 'establishment of religion,' within the prohibition of the First Amendment to the United States Constitution, nevertheless the right of the individual states to limit such public transportation to children attending the public schools is carefully preserved. Touching that question, the Supreme Court, in the majority opinion, said: 'While *we do not mean to intimate that a state could not provide transportation only to children attending public schools,* we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.' (Italics ours.)"

"Our own state constitution provides that no public money or property shall be used in support of institutions wherein the tenets of a particular religion are taught. Although the decisions of the United States Supreme Court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the Everson majority opinion which might be construed in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools. While

the degree of support necessary to constitute an establishment of religion under the First Amendment to the Federal Constitution is foreclosed from consideration by reason of the decision in the Everson case, supra, we are constrained to hold that the Washington constitution although based upon the same precepts, is a clear denial of the rights herein asserted by appellants.

"Speaking from the viewpoint of Art. I, §11, and Art. IX, §4, of our constitution, we are in full accord with the following pronouncement made by Mr. Justice Rutledge in his dissenting opinion in the Everson case, supra: 'By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome and [sic] Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which in fact give aid to or promote religious uses. [Citing cases.] Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.' "

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed with instructions to deny defendant's motion to dismiss, with costs to plaintiff.

Dated August 17, 1956.

Respectfully submitted,

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No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on behalf of himself and all other taxpayers similarly situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN MCKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

OPINION BELOW.

The two opinions of the District Court are set forth in the Transcript of Record (R. 15, R. 29), the principal opinion being also reported at 139 F. Supp. 171.

JURISDICTION.

The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C., Section 101; the jurisdiction of this Court rests on Section 1291 of the new Federal Judicial Code.

BASIC QUESTION PRESENTED.

Whether an Alaskan taxpayer as such, has standing to challenge the constitutionality of a Territorial statute authorizing the expenditure of Territorial funds when he *failed to allege* that as a result of the enforcement thereof he suffered a direct "legal injury" different from that suffered by the generality of taxpayers.

SECONDARY QUESTION PRESENTED.

May the District Court, in its discretion, award attorney's fees to the Territory as the successful litigant?

STATUTES INVOLVED.

The pertinent statutes are printed in the appendix.

STATEMENT.

The 1955 Territorial Legislature enacted Chapter 39, Session Laws of Alaska, 1955, which authorizes the expenditure of Territorial Funds for the trans-

portation of school children, "* * * who, in compliance with the compulsory education laws of Alaska, attend non-public schools * * * where such children, in order to reach such non-public schools, must travel distances comparable with, and over the routes the same as, the distances and routes over which the children attending public schools are transported." Chapter 6, Extraordinary Session Laws of Alaska, 1955, appropriated the funds to carry out Chapter 39.

On November 3, 1955, the appellant, an Alaskan taxpayer, on behalf of himself and all other taxpayers similarly situated, filed suit against various Territorial officials in the District Court, Juneau, Alaska, seeking to enjoin the expenditure of funds, on the alleged ground, among others, that the expenditure therefor violates numerous provisions of the Federal Constitution and Alaska's Organic Act and greatly increases the taxes which appellant and the other taxpayers of Alaska are obliged to pay. On November 18, 1955, the Territory filed a motion requesting the Court to enter an order dismissing the Complaint on the grounds: (1) that it does not state a claim upon which relief can be granted, and (2) that "It does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public." (R. 13.) After hearing extensive argument by counsel from both sides and considering numerous briefs presented by opposing counsel, the Court, on March 26, 956, rendered and filed its written opinion and decision authorizing the entry of an order granting the Territory's motion to dismiss appellant's

Complaint. (R. 15.) On April 23, 1956, the Court filed another opinion holding that the Territory, like the United States, is entitled to recover attorney's fees. (R. 29.) On April 18, 1956, the Court entered its final judgment and decree ordering that appellant's Complaint be dismissed. (R. 24.) Appellant filed his notice of appeal on May 8, 1956. (R. 26.)

FINAL ISSUES.

I.

Does an Alaskan taxpayer, as such, have standing to challenge the validity of a Territorial statute when he failed to allege that he suffered a direct legal injury different from that suffered by the generality of taxpayers as a result of its enforcement?

II.

May the District Court, in its discretion, award attorney's fees to the Territory of Alaska?

SUMMARY OF ARGUMENT.

Issue I.

Since the appellant, Reynolds, has not alleged that the enforcement of the territorial law threatens a violation of a particular legal right of his own, but on the contrary, has specifically alleged that he is subject to "like injury and damage" as thousands of other Alaskan taxpayers, he has no standing to sue in Alaskan Courts.

Point 1.

Federal Courts are unanimous in holding that a Federal taxpayer, as such, has no standing to question the constitutionality of a Federal expenditure unless he alleges that he has a particular legal right of his own to which "direct injury" is threatened thereby.

(a) Since the appellant has failed to allege a threatened injury to a legal right of his own, there exists no justiciable controversy herein.

(b) Other United States Supreme Court cases.

(c) United States Court of Appeals' decisions.

(d) However, a taxpayer, as such, can maintain an action against a municipality and against certain states, Puerto Rico and Hawaii.

Point 2.

The Mellon rule, commonly called the "Federal rule", has been made binding upon Alaskan Courts.

Point 3.

An analysis of the Complaint herein fails to disclose the existence of any allegation that a particular legal right of the appellant is being threatened with injury by the administration of Chapter 39, SLA 1955 or Chapter 6, Ext. SLA 1955.

Point 4.

Appellant's contention that he, in fact, alleged a direct and special injury to himself, thereby entitling him to sue, is not borne out by the record.

Issue II.

The District Court, in its discretion, may award attorney's fees to a successful litigant and it makes no difference if said litigant be the United States or Territorial government.

Point 1.

By virtue of specific statutory and judicial authority, the Court, in its discretion, may award attorney's fees to a successful litigant.

Point 2.

Appellant's contentions that: (1) the Court, in its discretion, should deny attorney's fees to the Territory, (2) the Territory is not a "party", and (3) defendants are salaried officials and nominal defendants only and hence, not entitled to attorney's fees, are untenable.

Conclusion.

ARGUMENT.

ISSUE I.

SINCE THE APPELLANT, REYNOLDS, HAS NOT ALLEGED THAT THE ENFORCEMENT OF THE TERRITORIAL LAW THREATENS A VIOLATION OF A PARTICULAR LEGAL RIGHT OF HIS OWN, BUT ON THE CONTRARY, HAS SPECIFICALLY ALLEGED THAT HE IS SUBJECT TO "LIKE INJURY AND DAMAGE" AS THOUSANDS OF OTHER ALASKAN TAXPAYERS, HE HAS NO STANDING TO SUE IN ALASKA COURTS.

POINT 1.

FEDERAL COURTS ARE UNANIMOUS IN HOLDING THAT A FEDERAL TAXPAYER, AS SUCH, HAS NO STANDING TO QUESTION THE CONSTITUTIONALITY OF A FEDERAL EXPENDITURE UNLESS HE ALLEGES THAT HE HAS A PARTICULAR LEGAL RIGHT OF HIS OWN TO WHICH "DIRECT INJURY" IS THREATENED THEREBY.

(a) Since the appellant has failed to allege a threatened injury to a legal right of his own, there exists no justiciable controversy herein.

The landmark case on the question of a taxpayer's standing to sue in a case of this nature is *Massachusetts v. Mellon (Frothingham v. Mellon)* (1923), 262 U.S. 447, 67 L. Ed. 1078. There, a taxpayer brought suit challenging the constitutionality of the so-called "Maternity Act." (42 Stat. at Large, 244.) This statute provided for an appropriation to be distributed among the several states for the purpose of reducing infant mortality. It was asserted by the plaintiff-taxpayer that these appropriations were not national but local and they fell unequally upon the several states in that the cost of the program bore more heavily on the industrial states such as Massachusetts. At 262 U.S., page 480, the Supreme Court stated:

> "We have reached the conclusion that the cases must be disposed of for want of jurisdiction, without considering the merits of the constitutional questions."

In holding that the taxpayer had no capacity to maintain the action the Supreme Court laid down the following rule of law which has been unanimously followed and recognized by every Federal decision we have been able to find. At pages 487-489, the Court said:

> "The administration of any statute likely to produce *additional taxation* to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * * *We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.* That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. * * *. The party who invokes the power (the power of the courts to nullify acts of the legislature) must

be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * * Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. *To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess. * * * dismissed.*" (Cf. *Williams v. Riley,* infra. (Emphasis supplied.)

Thus, it is evident at this point that a statute, the administration of which results in additional taxation, constitutes no legal basis for a taxpayer, as such, to enjoin the same since, as the Supreme Court itself says, that is "a matter of public, and not individual concern".

(b) Other United States Supreme Court cases.

Our research has disclosed that the *Mellon* rule has been expressly followed and otherwise recognized in no less than seventy-two (72) Supreme Court and Federal Circuit Courts of Appeals decisions. A fair cross section of Supreme Court cases are as follows:

In *Alabama Power Co. v. Ickes,* 302 U.S. 464, 478-479, 82 L. Ed. 374, 378, the Court restated the *Mellon* rule in this manner:

"* * * Petitioner alleges that it is a taxpayer; but the interest of a taxpayer in the moneys of the Federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity. Massachusetts v. Mellon, 262 U.S. 447, 486 et seq., 67 L. Ed. 1078, 1084, 43 S. Ct. 597. The principle established by the case just cited is that the courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question 'only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' The term 'direct injury' is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious that he has no cause to complain. * * *.'"

Florida v. Mellon, 273 U.S. 12, 18, 71 L. Ed. 511, 515, held that the State of Florida sustained no direct injury merely because the Federal Inheritance Tax limits that state's base of taxation by affording residents an incentive to move their property from Florida. In *Williams v. Riley,* 280 U.S. 78, 79, 80, 74 L. Ed. 175, a California taxpayer sued to set aside as unconstitutional a statute levying three (3) cents

on each gallon of gasoline sold in that state. The Court at pages 79, 80, pointed out that:

> "Appellants, along with thousands of other citizens and taxpayers of California, operate motor vehicles along the highways. * * * The Federal courts have no power per se to review and annul acts of state legislatures upon the ground that they conflict with the Federal or State Constitution. '*That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.*'" (Emphasis added.)

Fairchild v. Hughes (1922), 258 U. S. 126, 130, 66 L. Ed. 499, 504, involved a suit to have the Nineteenth Amendment to the Federal Constitution declared unconstitutional on the ground that it could not be made part of the Constitution in that it had not been properly ratified. It was held that the general right possessed by every citizen to require that the Federal Government be administered according to law and that the public monies be not wasted, did not entitle a private citizen, in his capacity as such, or as a taxpayer, to maintain a suit for a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L. Ed. 817, 842. Here the Court again reaffirmed the general rule by stating:

> "* * * A petitioner does not have standing to sue unless he is 'interested in and affected adversely by the decision' of which he seeks to

> review. His 'interest must be of a personal and not of an official nature.' (Citing cases.) The interest must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be. (Citing cases.) A litigant must show more than that 'he suffers in some indefinite way in common with people generally.' "

Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 1595. In the *Barrows* case, the Court recognized the validity of the *Mellon* rule, but distinguished it on the basis of the facts in that case. In commenting upon the *Mellon* case, the Court, by use of the following language, summarized the holdings of a long line of decisions, commencing with the *Mellon* case:

> "* * * The common thread underlying both requirements (a person may not vindicate the constitutional rights of a third party and there must be a case or controversy) is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. * * *"[1]

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[1]Cf. *Coleman et al. v. Miller*, 307 U.S. 433, 440, 441, 83 L. ed. 1385, 1390; *Willing et al. v. Chicago Auditorium Assoc.*, 277 U.S. 274, 289, 72 L. ed. 880, 884; *Columbus & Greenville Railway Co. v. W. J. Miller*, 283 U.S. 96, 100, 75 L. ed. 861, 865; *Western Pac. Calif. Railroad Co. v. Southern Pacific Co.*, 284 U.S. 47, 51, 76 L. ed. 160, 163; *Champlin Refining Co. v. Corporation Commission of the State of Okla.*, 286 U.S. 210, 238, 76 L. ed. 1062, 1080; *Doremus v. Board of Education*, 342 U.S. 429, 433, 96 L. ed. 475; *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 78 L. ed. 1109, 1113; *U.S. v. Wm. M. Butler, et al.*, 297 U.S. 1, 58, 80 L. ed. 477, 484; *Aetna v. Haworth*, 300 U.S. 227, 239, 81 L. ed. 617, 621; *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125, 84 L. ed. 1108, 1114; *Singer & Sons, et al. v. Union Pacific Railroad Co.*, 311 U.S. 295, 303, 85 L. ed. 198, 203; *Wm. B. Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 45 L. ed. 252.

(c) United States Court of Appeals decisions.

All of the United States Circuit Court decisions relating to Federal taxpayers have either expressly followed or recognized the *Mellon* rule. A fair cross-section of these are as follows:

Elliott v. White (CCA-DC), 23 F. 2d 997, 998, held that a Federal taxpayer has no legal standing to enjoin the United States Treasurer from disbursing funds appropriated for salaries of Congressional chaplains on the ground that the employment of these men constitutes the establishment of a religion contrary to the First Amendment.

In *Duke Power Co. v. Greenwood County* (CCA-4th), 91 F. 2d 665, 676, a plaintiff attacked the validity of a statute which authorized Federal loans and grants to cities for the construction of public works projects designed to relieve widespread unemployment. At page 676, the Fourth Circuit Court had the following to say about the plaintiff's capacity to maintain the action:

> "* * * While some state courts recognize the right of a taxpayer to enjoin the unauthorized use of public funds, it is well settled in the federal courts that such use of the funds of the United States violates no right of the taxpayer of which he may complain. Frothingham v. Mellon, 262 U.S. 447 * * *."

Wheless v. Mellon (CCA-DC), 10 F. 2d 893, 895. In a suit by a taxpayer on behalf of himself and all other taxpayers similarly situated to set aside a Veterans' Compensation Act on the ground that it

was invalid, the Court had this to say concerning the capacity of a taxpayer to maintain the action:

> "* * * The right of the complainant to bring this suit is based solely upon the claim that because of the act he will suffer injury as a citizen and taxpayer, in common with all other citizens and taxpayers similarly situated, and that he should have 'the right possessed by every citizen to require that the government be administered according to law and that the public moneys be not wasted.' * * * we hold that the complainant below was without standing in the suit, and accordingly, we affirm the decree of the lower court, * * *."

Railway Express, Inc. v. Kennedy, et al., 189 F. 2d 801, 804, 805. In this case the plaintiff sued the Railroad Retirement Board to enjoin it from paying unemployment insurance benefits for days lost by a strike, on the ground, among others, that if such payments are made, plaintiff's taxes will be increased. The Seventh Circuit Court affirmed a lower court's dismissal of the complaint on the ground that the plaintiff has no capacity to maintain the action. In so doing, the Appellate Court stated:

> "* * * It is not sufficient that plaintiff as a member of the public desires a law to be correctly administered. * * * It has been many times held that a taxpayer of federal taxes has no standing to sue to prevent the expenditure of federal funds under a statute which he claims to be unconstitutional, even though such expenditure might possibly result in an increase in the taxes which he will eventually be compelled to pay. Common-

wealth of Massachuetts v. Mellon (Frothingham v. Mellon), 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. * * *"

And finally, in *Arkansas-Missouri Power Co. v. City of Kennett, Mo., et al.* (CCA-8th), 78 F. 2d 911, 914, it was again stated:

"* * * We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. * * *" (*Mellon* case cited.)[2]

This Court, in *Fallbrook Public Utility District v. United States District Court, Southern District Cali-*

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[2]Cf. *U.S. v. Mayor and Council of City of Hoboken, N.J.*, 29 F. 2d 932, 946; *U.S. v. Mellon*, 32 F. 2d 415, 418; *Kansas Gas and Electric Co. v. City of Independence, Kan., et al.*, 79 F. 2d 32, 40; *Greenwood County, S.C., et al. v. Duke Power Co., et al.*, 81 F. 2d 986, 997; *Electrical Securities Corporation v. Commissioner of Internal Revenue*, 92 F. 2d 593; *Fletcher v. U.S.*, 92 F. 2d 713, 714; *Franklin Trust Company v. City of Loveland. Colo., et al.*, 3 F. 2d 114, 116; *Fox Film Corp. v. Trumbull*, 7 F. 2d 715, 728; *Dunn v. Fort Bend County, et al.*, 17 F. 2d 329, 332; *U.S. v. Deming*, 19 F. 2d 697, 698; *Central Trfs. Co. v. Commercial Oil Co., et al.*, 45 F. 2d 400, 402; *United Shoe Machinery Corporation v. Compo Shoe Machinery Corp.*, 56 F. 2d 292, 295; *U.S. ex rel N.Y. Warehouse, Wharf & Terminal Ass'n, Inc., et al. v. Dern*, 68 F. 2d 773, 774; *City of Allegan, Mich. v. Consumers' Power Co.* (6th CCA), 71 F. 2d 477, 481; *Tenn. Valley Auth. v. Ashwander, et al.*, 78 F. 2d 578; *Vick Chemical Co. v. Tho. Kerfoot & Co.*, 80 F. 2d 73, 77; *Burco, Inc. v. Whitworth, et al.*, 81 F. 2d 721, 729; *Dallas Joint Stock Land Bank v. Davis*, 83 F. 2d 322, 323; *Ala. Power Co. v. Ickes*, 91 F. 2d 303, 305; *Ballou v. Kemp*, 92 F. 2d 556, 561; *Wallace v. Ganley, et al.*, 95 F. 2d 364, 366; *Ex parte Cowen*, 98 F. 2d 530, 532; *Ark. La. Gas Co. v. City of Texarkana, Tex., et al.*, 100 F. 2d 652, 654; *Ex-Cell-O Corporation v. City of Chicago* (7th CCA), 115 F. 2d 627, 628; *Tenn. Valley Auth., et al. v. Tennessee Electric Power Co., etc.*, 90 F. 2d 885, 892; *Wm. L. Ross & Co., Inc. v. Road District No. 4 of Shelby County, Tex.*, 27 F. 2d 153, 155.

fornia, So. Div., et al. (CCA-9th), 202 F. 2d 942, 943, defined the term "legal right" and went on to hold that for the Court to grant relief when there was a failure to allege a special injury constituted a violation of the Separation of Powers doctrine:

> "* * * a federal court has no power, *per se,* to question the acts of the executive departments. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' (Mass. v. Mellon.) And this principle may only be applied where 'the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.' (Citing Tenn. Power Co. v. T.V.A.) Thus, petitioner is not the proper party to raise the question of the validity of this expenditure."

All of these authorities follow the *Mellon* rule which prohibits a taxpayer, like the one in the case at bar, to maintain an action to contest the validity of a Federal statute.

(d) A taxpayer, as such, can maintain an action against a municipality and against certain states, Puerto Rico, and Hawaii.

It is conceded, however, that a taxpayer may bring a taxpayer's action, as such, against a municipality. *Crampton v. Zabriskie,* 101 U.S. 601, 25 L. Ed. 1070; *Valentine v. Robertson, et al.* (CCA-9th), 300 Fed. 521, 525. Also, in Puerto Rico, Hawaii, and in numerous state jurisdictions, as appellant points out in his opening brief, a taxpayer has standing to test the

legality of state expenditures therein. *Buscaglia v. District Court of San Juan* (CCA-1st), 145 F. 2d 274; *Castle v. Secretary of Hawaii,* 16 Hawaii 769; *Aiken v. Armistead,* 186 Ga. 368, 198 S.E. 237.

It is admitted that *in these particular jurisdictions,* taxpayers have capacity to maintain an action of this nature. However, the rule is otherwise as far as suits against the United States Government, Territorial Government of Alaska and certain state jurisdictions are concerned.[3]

The next matter to consider therefore, is whether the *Mellon* rule has, in fact, been made applicable to Alaska.

POINT 2.

THE MELLON RULE HAS BEEN MADE BINDING UPON THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

On April 29, 1949, this Court handed down its decision in *Sheldon, et al. v. Griffin,* 174 F. 2d 382, 384, and expressly held—without equivocation—that a taxpayer in Alaska had no standing to question the validity of an act of the Territorial Legislature without

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[3]Though a majority of the states do not follow the *Mellon* rule, the following states have held that a taxpayer, as such, has no capacity to enjoin the alleged unlawful expenditures of public monies:

Louisiana: *Sutton v. Buie,* 136 La. 234, 66 So. 956;
New Mexico: *Asplund v. Hannett,* 31 N. Mex. 641, 249 Pac. 1074;
New York: *Schieffelin v. Komfort,* 212 N.Y. 520, 106 N.E. 675;
(New York subsequently enacted a status giving taxpayers a right to enjoin the misapplication of municipal funds—taxpayer still may not enjoin the expenditure of state funds.)
Washington: *Pierce County v. Superior* Ct., 86 Wash. 685, 151 Pac. 108;
Oregon: *Taylor v. Lord,* 28 Ore. 498, 43 Pac. 471.

showing that he suffered some injury personal to himself, which is not common to the general public. In the *Griffin* case, a taxpayer, suing as such, filed action against the executive director of the Territorial Unemployment Compensation Commission alleging that an amendment to the Unemployment Compensation Act was irregularly and illegally passed by the Legislature. On page 384, this Court had the following to say about an Alaskan taxpayers' capacity to question the validity of a Territorial statute:

> "* * * There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. *To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people.* Frothingham v. Mellon, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078. Cf. also Perkins v. Lukens Steel Co., 310 U.S. 113, 125, 60 S.Ct. 869, 84 L. Ed. 1108; State of Minn. ex rel. Smith v. Haveland County Assessor, 223 Minn. 89, 25 N.W. 2d 474, 174 A.L.R. 544."
> "The judgment is reversed with directions to dismiss the suit." (Emphasis supplied.)

In his brief, appellant attempts to distinguish the *Griffin* case by arguing that no public funds were involved therein and that the challenged statute added nothing to the burden of taxpayers in Alaska. We

have examined the pleadings in the transcript of record in *Sheldon, et al. v. Griffin,* (supra) in order to determine the real issues involved. (No. 12,097 U.S. Court of Appeals for the Ninth Circuit.) Griffin's amended Complaint reads in part as follows: (See pages 11 and 18 of the Transcript in No. 12,097.)

"I.

> That plaintiff is now and was at all times herein mentioned a resident citizen and taxpayer of the Territory of Alaska.

* * * * * * *

XXI.

> That if the said experience rating credits are issued it will result in a wrongful, *illegal and unlawful loss of funds* of the Territory of Alaska, and without any authority of law, or right, and will be wholly lost to the taxpayers of the Territory of Alaska, and that plaintiff and all other taxpayers of the Territory of Alaska will be irreparably damaged and injured thereby, and all without any possible redress or any plain, speedy or adequate remedy at law." (Emphasis supplied.)

These allegations were denied, therefore putting them in issue. (Transcript of Record in *Griffin* case, pages 35-39.)

The appellant's brief on appeal in the *Griffin* case sets forth six specific grounds of error. The first five were based on the merits and the sixth was predicated upon the contention that the Court has no jurisdiction because the *Mellon* rule was applicable to Alaska,

hence urging the Court to rule that the plaintiff had no capacity to sue. It is clear that this Court reversed Judge Dimond solely on the basis of this sixth point. The case relied upon by the appellants therein under point number six (6) was *Massachusetts v. Mellon (Frothingham v. Mellon)*, supra.

The appellant herein seemingly fails to perceive the basic reasoning underlining the *Sheldon* case. On page 35 of his brief, he summarizes his argument of the preceding four pages, centering around the inapplicability of that case to the case at Bar, with this statement:

> "In short, it seems clear to us that the Court of Appeals in the *Sheldon* case cited *Massachusetts v. Mellon* for a particular point—to show that where there is no justiciable controversy, there can be no suit. *And the Court of Appeals held that a taxpayer shows no justiciable controversy where no added tax burden is involved.* The Court plainly states this point." (Emphasis supplied.)

This italicized statement epitomizes the basic error of the appellant's argument. He correctly states the premise, mainly that the *Mellon* case stands for the proposition that where there is no justiciable controversy, there can be no suit. But the conclusion drawn from this premise, namely, that a taxpayer "shows no justiciable controversy where no added tax burden is involved", is manifestly erroneous. The determination as to whether a case or controversy exists is not dependent upon whether or not there is an "added tax burden involved" but is dependent upon whether

the taxpayer can show he himself is injured differently from all other taxpayers by the operation of the statute. The *Mellon* case and every case thereafter citing it demonstrates that principle. Even though an expenditure might result in an increase in taxes which he is compelled to pay that fact does not give a taxpayer the right to sue. *Arkansas-Missouri Power Company v. City of Kennett, et al.,* (CCA-8th) 78 F. 2d 911, at page 914; *Fallbrook Public Utility District v. United States District Court So. District California, et al.,* (CCA-9th) 202 F. 2d 942, at page 943, and all other cases cited, supra. Moreover, we were unable to find, in a review of the numerous decisions on this subject, any case making the distinction claimed by the appellants to the effect that the *Mellon* rule is only applicable when a tax burden is involved. As a matter of fact, in the *Mellon* opinion at 262 U.S. 487-489, the Supreme Court expressly states that additional taxation is a "matter of public, and not of individual concern."

A cursory examination of the *Sheldon* case discloses that this Court held that no justiciable controversy exists, *not because* there was a failure to show an added tax burden, *but because;* "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. * * *" (174 F. 2d 382, at page 384.)

In view of this fact and for the express reason that this Court cited the *Mellon* decision as a basis for its

holding in the *Griffin* case, it is a compelling conclusion that the Federal rule, which up to that time applied to a taxpayer's suit against the Federal Government, was then and there made applicable to an Alaskan taxpayer's suit against the Territorial Government. That this is a valid interpretation of the *Griffin* case and conclusive evidence of this Court's intent *not* to follow the majority of state jurisdictions and the Territories of Puerto Rico and Hawaii is shown, with compelling force, by considering the *Griffin* decision within the context of the following statement made by this Court in 1936 in *Demmert v. Smith,* 82 F. 2d 950, 952 (CCA-9th):

> "At the argument of this case the question was raised as to whether or not a taxpayer could bring an action such as this. The Supreme Court in Massachusetts v. Mellon, 262 U.S. 447, 486, 43 S. Ct. 597, 67 L. Ed. 1078, held that the relation of taxpayer of the United States to the federal government is such that he could not maintain such an action upon his status of taxpayer alone, although recognizing that the interest of the taxpayer of a municipality in the application of its moneys is so immediate and direct as to justify the remedy of injunction to prevent the misuse of public funds. *As to whether or not a taxpayer of Alaska, a territory of the United States, can maintain a taxpayer's suit is a point that need not be decided in this case for reasons already pointed out and we refrain from expressing any option on that question.*" (Emphasis supplied.)

Therefore, between the date the *Demmert* decision was handed down in April of 1936, when this Court per-

mitted the applicability of the *Mellon* rule to an Alaskan taxpayer's suit to pass sub silento, and the date of the *Griffin* decision in April of 1949, the question of whether or not an Alaskan taxpayer had standing to question the validity of a Territorial expenditure was wide open. During this time the so-called majority rule of the state jurisdiction and our sister territories could be urged for consideration upon the Court. However, when the *Griffin* case was decided in April of 1949, this Court closed the question as far as the District Court for the District of Alaska is concerned and expressly and explicitly made the *Mellon* rule applicable to the Territory of Alaska. If the appellant were frank about this matter, he would request the Court to reverse the *Sheldon* case rather than attempt to distiguish it for reasons that lack substance.

In summarizing therefore, it is clear that based upon the pleadings and written arguments in the *Griffin* case, one of the main issues squarely before this Court therein and ultimately decided, was whether or not a taxpayer of Alaska had capacity to enjoin the alleged "wrongful, illegal and unlawful loss of funds of the Territory of Alaska * * *." This Court, as stated heretofore, held that an Alaskan tax payer, as such, could not so sue unless he alleged a direct injury to himself different from that suffered by the generality of taxpayers. This rule is presently in effect in Alaska and will continue to be so unless changed by the Territorial Legislature or this Court reverses the *Sheldon* case.

Appellant makes no attempt to distinguish *Shelton v. Wade,* 130 F. Supp. 212, (Alaska District Court). He is in effect forced to admit that it is on "all fours" with the case at Bar. Faced with this dilemma he contends that Judge George W. Folta, who rendered the opinon, did not understand the *Griffin* case and therefore, erroneously concluded that he was bound by it. In substance, appellant, on page 34-35 of his brief, states that Judge Folta did not: (1) refer to the statement in that case concerning the burden of Alaskan taxpayers, (2) discuss the *Valentine* or *Buscaglia* cases, or (3) discuss or appreciate the vast body of state authorities allowing suits of this type by city, county and state authorities.

The late Judge Folta was a thorough man and was obviously aware of Judge Dimond's opinion in the *Sheldon* case which upheld the validity of a taxpayer's suit in Alaska. However, he recognized the binding effect of this Court's reversal of Judge Dimond and felt constrained to follow it. The following excerpt from Judge Folta's opinion will show that he did not give a hurried opinion. He not only appreciated the divergency of judicial views on the issue but fully understood and appreciated all views. He cited all leading cases and an A.L.R. citation which fully briefed all views including the so-called majority view:

> "* * * The interest which must be shown as a prerequisite to the maintenance of a suit by a taxpayer for injunctive relief is a matter upon which the authorities are divided, Anno. 58 A.L.R. 588. The weight of authority is that the

unlawful diversion of funds by a municipality or state may be enjoined by a taxpayer. However, a minority of the courts supports the view that states should be allowed great latitude in making appropriations and that they may be restrained by a taxpayer only where he is able to show that he will suffer a direct injury. So far as federal funds are concerned, the question was laid at rest by the Supreme Court in *Massachusetts v. Mellon* and *Frothingham v. Mellon,* 262 U.S. 447, in which it was *declared that the doctrine of the separation of powers precluded an examination into the constitutionality of a statute except where the complaining taxpayer suffers, or is threatened with, a direct injury.* In *Griffin v. Sheldon,* 78 F. Supp. 466, Judge Dimond adopted the majority view and, although much could be said in favor of the proposition that every state and territory should be allowed to formulate its own policy, particularly in view of the remote relationship borne by the taxpayer to the federal government as compared with the much closer relationship borne to local government, Judge Dimond's decision was reversed, *Sheldon v. Griffin,* 174 F. 2d 382, on the authority of *Massachusetts v. Mellon,* supra. *Since the plaintiff has not shown that he will suffer any injury that will not be suffered in common by the general public, he has no standing to sue, and hence the decision of the Court of Appeals for this Circut is dispositive of this controversy and requires that the motion for a preliminary injunction be dismissed and the restraining order dissolved.*" (Emphasis supplied.)

Surely in view of the above statement from the Court's opinion, it cannot be stated that Judge Folta

did not appreciate the significance of the majority view. The opposite observation is more appropriate, i.e., he fully appreciated all sides and felt constrained as a matter of judicial conscience to follow this Court's decision in *Sheldon v. Griffin*, supra. The apparent reason why neither Judge Folta nor Judge Hodge considered the tax burden statement in the Sheldon cause is easily discernible. As has been heretofore shown, whether or not there was a tax burden makes no difference in determining a taxpayer's capacity to sue. The only relevant matter which these two judges and all Federal judges have been concerned with was whether the taxpayer alleged and proved the statute in question imposed a direct injury on themselves different from that suffered by the generality of taxpayers. The late Judge Folta did not discuss the *Buscaglia* or *Valentine* cases because apparently neither counsel brought them to his attention.

POINT 3.

AN ANALYSIS OF THE COMPLAINT HEREIN FAILS TO DISCLOSE THE EXISTENCE OF ANY ALLEGATION THAT A PARTICULAR LEGAL RIGHT OF THE APPELLANT IS BEING THREATENED WITH INJURY BY THE ADMINISTRATION OF CHAPTER 39, SLA 1955 OR CHAPTER 6, EXT. SLA 1955.

Nowhere in appellant's seven-page Complaint does he allege that he will suffer a direct personal injury different from that suffered by the public generally resulting from the administration of Chapter 39, SLA 1955 and Chapter 6, Ext. SLA 1955. To the contrary, appellant is candid and alleges that he and the general public will suffer "like injury and dam-

age". Paragraph 3, page 2 of the Complaint herein states in part as follows:

> "3. The citizen, resident taxpayers of said Territory number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to *like injury and damage* as the injuries complained of in plaintiff's complaint. * * *" (R. 4.) (Emphasis supplied.)

Under paragraph 8, page 5 of said Complaint, it is alleged:

> "* * * and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof." (R. 8.)

These allegations clearly demonstrate that the appellant is attempting to set aside an act of the Alaska Legislature on the ground that, as a result of its enforcement, the tax burden upon all Alaskan taxpayers, not just upon the appellant alone, will be proportionately increased, i.e., not that he will be hurt any more than the others but all will be allegedly equally injured.

By failing to allege that the enforcement of Chapter 39 and Chapter 6 threatens a violation of a particular legal right of his own, an allegation which he could not, in fact, make, the appellant has brought himself squarely within the *Mellon* rule as made applicable to Alaska by *Sheldon v. Griffin* (supra), and therefore, lacks capacity to maintain the action herein. Not only

does the appellant fail to allege a special type of injury necessary to give him standing to sue, but as stated earlier, and which we think is worthy of repetition, he has alleged that he and the general public will suffer "like injury and damage".

POINT 4.

APPELLANT'S CONTENTION THAT HE, IN FACT, ALLEGED A DIRECT AND SPECIAL INJURY TO HIMSELF, THEREBY ENABLING HIM TO SUE, IS NOT BORNE OUT BY THE RECORD.

Appellant's argument, found on page 45 of his brief, to the effect that his injury is *different* from that suffered by the general public is clearly fallacious.

He contends that taxpayers show injury not suffered in common by the general public once they show that public funds to which they have contributed by taxes are being unlawfully expended.

This assertion demonstrates a lack of appreciation of the *Mellon, Griffin* and *Wade* holdings. When these decisions alluded to the phrase "people generally" (Mellon), or "the generality of people" (Griffin) or "general public" (Wade), they were obviously referring to the generality of taxpayers as a class and not to non-taxpayers such as children, insane persons and people in the penitentiary. This is so clear that a mere cursory examination of these decisions can leave a reasonable person with no other conclusion.

It is apparent that these Courts meant what their plain words imported, i.e., in order to be considered as having capacity to enjoin an alleged illegal expenditure of Federal or Territorial funds, a taxpayer must allege and prove that:

> "* * * he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people. * * *" (184 F. 2d, page 384.)

Viewing this matter from an objective point of view, it can hardly be disputed that thousands of Alaskan taxpayers have paid their taxes, and like the appellant, none were injured any differently than he and therefore, neither they nor the appellant have standing to question the constitutionality of the statute herein involved. There must be a "direct injury" to the taxpayer himself as that term is defined by the Supreme Court, before any taxpayer may bring suit. Cf. *Tenn. Electric Power Co., et al. v. T.V.A., et al.,* 306 U.S. 118, 137, 83 L. ed. 543, 549.

Appellant's oft-repeated assertion that Alaska has a small population and therefore should not have the *Mellon* rule made applicable to it, is an argument for a change of policy and has no relevance to the legal principle involved in this litigation. This argument should be addressed to the Territorial Legislature.

The Court's attention is directed to the oft-cited "chain store" case of *State Board of Tax Commissioners v. Jackson,* 283 U.S. 527, 75 L. ed. 1248. There, the taxpayer, a chain store owner, alleged and tried to prove that he was being injured differently than the generality of other taxpayers and particularly that he was being discriminated against in favor of independent store owners. In that case there was no doubt

whatever of the taxpayer's right or capacity to sue for he alleged that he and members of his class were being singled out for a particular type of discrimination. Though he ultimately failed in his endeavor, the jurisdictional question of his capacity to sue was never doubted. However, in the case at Bar, it is impossible for this plaintiff to show that he is being injured differently, if at all, than other taxpayers in Alaska by the appropriation of money to carry both public and non-public school children to the premises of the nearest public school.

ISSUE II.

THE DISTRICT COURT, IN ITS DISCRETION, MAY AWARD ATTORNEY'S FEES TO A SUCCESSFUL LITIGANT AND IT MAKES NO DIFFERENCE IF SUCH A LITIGANT BE THE UNITED STATES OR TERRITORIAL GOVERNMENT.

POINT 1.

UNDER THE AUTHORITY OF THE FEDERAL RULES OF CIVIL PROCEDURE, TERRITORIAL LAW, LOCAL RULE 25 AND JUDICIAL PRECEDENT, THE COURT, IN ITS DISCRETION, MAY AWARD ATTORNEY'S FEES TO THE TERRITORIAL GOVERNMENT THE SAME AS SUCH FEES MAY BE AWARDED TO THE FEDERAL GOVERNMENT.

Section 55-11-51 ACLA 1949 is the pertinent Territorial Statute relevant to the allowance of attorneys fees as costs. Said statute reads as follows:

> "§55-11-51. Compensation of attorneys. The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees

in maintaining the action or defense thereto, which allowances are termed costs."

It is noted that under this statute, the "prevailing party" is not restricted to private persons.

Rule 54(d), Federal Rules of Civil Procedure provides:

"Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *."

Local Rule 25 for the District Court of Alaska states:

"Rule 25. Attorney's Fees.

(a) Allowance to Prevailing Party as Costs: (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the prevailing party as part of the costs of action allowed by law: * * *."

That attorney fees may be included as an item of "costs" appears to be admitted by counsel for the plaintiff. See *Pilgrim v. Grant, et al.,* 9 Alaska 417, and compare *Forno v. Coyle* (CCA-9th), 75 F. 2d 692. There is also precedent which holds that the allowance of attorney fees to the prevailing party is *customarily* made in the courts of Alaska, notwithstanding that such allowance is discretionary. *United States v. Breeden, et al.,* (Dist. Ct., Alaska) 14 Alaska 214, 110 F. Supp. 713.

The right of the Territory to collect attorney fees, (not the Attorney General personally), if granted by the Court, appears heretofore to have been presumed or conceded, in most instances. See *Territory of Alaska v. Alaska Metals and Powers,* A-7044 (Dist. Ct., 1st Div.); *Territory of Alaska v. Katherine S. Fletcher,* A-7124, (Dist. Ct., 1st Div.); *Territory of Alaska v. Paul Peringer,* A-7023, (Dist. Ct., 1st Div.); *Ryker v. Ryker,* Uniform Support Action, A-9206, (Dist. Ct., 3d Div.); *March v. March,* Uniform Support Action, A-9160, (Dist. Ct., 3d Div.); *Smith v. Patrick,* Uniform Support Action, A-9823, (Dist. Ct., 3d Div.); *Arthur v. Arthur,* Uniform Support Action A-10, 120, (Dist. Ct., 3d Div.); *Proulx v. Proulx,* Uniform Support Action, A-10, 521, (Dist. Ct. 3d Div.); and *Long v. Long,* Uniform Support Action, A-9457, (Dist. Ct., 3d Div.).

In the case of *State of Missouri v. State of Illinois, et al.,* 202 U.S. 509, 50 L. ed. 1160-1161, Illinois was authorized to collect certain costs including "Solicitors' fees." The eminent Supreme Court Justice Holmes premised his view principally on the assertion, that "* * * there is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case." (Page 600.) There is no discernable reason herein why appellant, who also failed to establish his case, should be treated any differently than other suitors who fail merely because he chose to sue the Territory.

In the *State of North Dakota v. State of Minnesota,* 263 U.S. 583, 68 L. ed. 461, the Supreme Court per-

mitted the State of Minnesota to recover costs taxed against the State of North Dakota. The opinion refers to numerous cases wherein several states were allowed to recover funds necessary to conduct the litigation.

If the Court determines that the Territory is not entitled to receive attorney fees because its legal officers are salaried personnel, it must necessarily apply the same rule of reasoning to attorneys employed by the United States Department of Justice, a Federal Agency, in that the latter are also "salaried officers." Professor Moore in Volume 6 of his Treatise on "Federal Practice", pages 1339-1340, discusses the right of the United States to recover costs as follows:

> "§54.75. Costs For and Against the United States, its Officers and Agencies; Governmental Corporations. Blackstone stated the general common law rule regarding the sovereign and costs as follows:
>
> > 'The king (and any person suing to his use) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.'
>
> "The United States seems never to have had any kingly dignity preventing it from recovering costs; although it has, in general, followed the kingly prerogative against paying costs. In *Pine River Logging Co. v. United States,* the Court stated the general doctrine in this manner:
>
> > 'While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases at least,

that the United States recover the same costs as if they were a private individual.'

"If the United States is the prevailing party it is, pursuant to Rule 54(d), entitled under the general principle of that Rule to costs as of course, 'unless the court otherwise directs', which gives the district court discretion to vary the general principle: except that an express provision in a statute of the United States or in the Federal Rules is to control. Thus under Rule 71A, which governs actions for the condemnation of property under the power of eminent domain, although the United States be the prevailing party, it is not entitled to costs."

And see Volume 3, *Federal Practice and Procedure,* (Barron and Holtzoff), page 29.

In *Solomon v. Welch* (D.C., California 1949), 28 F. Supp. 823, the defendant, a Collector for the Bureau of Internal Revenue, sought attorney fees, although represented by attorneys of the Federal Government. The Court permitted the recovery saying:

"Finally it must be assumed that those who drafted this new rule 54(d) knew the law which had prevailed prior to the adoption thereof. Had they intended to prohibit the allowance of costs to an officer of the United States, in whose favor a judgment had been rendered, they could easily have so declared. Instead, such new rule expressly states: 'Except when express provision therefor is made either in a statute of the United States or in these rules, *costs shall be allowed as of course to the prevailing party* unless the court otherwise directs. * * *'" (Emphasis supplied.)

"It is conceded that there is no express provision either in a statute of the United States or in these new rules which excepts the present case from the general rule that 'costs shall be allowed as of course to the prevailing party.' Likewise in the action at bar the court has not otherwise directed. On the contrary, the judgment entered herein expressly awards costs to the defendant.

"Hence we conclude that the defendant is entitled to recover all such costs as would be awarded to any prevailing party."

No valid distinction is suggested why a different rule pertaining to costs as applied to the United States and its public officers should exist when the Territory of Alaska or the public officials thereof are made party-litigants to a lawsuit. The taxpayers of the Territory should be equally benefited and "indemnified" as are the taxpayers of the United States when the Federal Government collects costs. No provision in either the United States Code or the Alaska Code was found forbidding the Territory from collecting costs, including attorney fees, from an opposing party. Cf. Section 55-11-51 ACLA 1949.

In passing, it is pointed out that nowhere in appellant's brief does he attempt to explain how his contention that the Territory should not be awarded attorney fees can be justified in the face of the fact that the United States Government is allowed attorney fees as a matter of course.

It is submitted that the practice which has existed for a period of years both as to the Federal Govern-

ment and the Territory should not now be set aside. Considerable valuable time was spent by the attorneys for the Territory in preparing and researching the above entitled case which otherwise could have been applied to the collection of revenue or matters of far more importance.

POINT 2.

APPELLANT'S CONTENTIONS THAT: (1) THE COURT, IN ITS DISCRETION, SHOULD DENY ATTORNEY'S FEES TO THE TERRITORY, (2) THE TERRITORY IS NOT A "PARTY", AND (3) DEFENDANTS ARE SALARIED OFFICIALS AND NOMINAL DEFENDANTS ONLY AND HENCE, NOT ENTITLED TO ATTORNEY'S FEES, ARE UNTENABLE.

Counsel for the appellant advances the following arguments why the Territory should not be awarded attorney's fees:

(1) That the Court in its discretion should deny attorney fees to the Territory of Alaska;

(2) That the Territory of Alaska is "not a party" to the action; and

(3) That the defendants are nominal party-defendants only, salaried officials of the Territory and have not incurred any personal expense.

Regarding Contention No. 1.

As stated above, the general rule is "that costs should be allowed as of course to the prevailing party unless the Court otherwise directs", Rule 54(d), F.R.C.P., and in Alaska, the prevailing party is customarily allowed attorney fees. *United States v. Breeden, et al.* (supra). It was in the discretion of the District Court to award attorney fees and so long

as such fees are not unreasonable, they should not be set aside.

Regarding Contention No. 2.

Ofttimes actions are brought against Territorial officers which are actually against the Territory itself. *Pacific American Fisheries v. Territory,* 7 Alaska 147. The material fact in determining whether the suit against a public officer or officers is one against the Territorial Government depends not on the character of the defendant's office but on the nature of the suit or of the relief demanded. See 86 C.J.S., 646, *Territories,* Section 38. The relief sought in plaintiff's complaint is to enjoin the defendants, public officials, from performing certain functions relating to the office they hold. The prayer does not seek to enjoin individual acts of these officers, personal in nature, but rather acts which directly relate to the ordinary duties of their office. The action is, in fact, against the Territory of Alaska.

The Attorney General of the Territory of Alaska is the legal advisor "for the Treasurer" and "other officers of the Territory". See Section 9-1-5, ACLA 1949. As such, he has the obligation of representing these persons in all legal matters and necessarily any monies collected for attorney fees must be transmitted to the Attorney General's employer, the Territorial Government.

Even assuming plaintiff's contention that the action is not against the Territory but against certain "public officials", the case of *Solomon v. Welch*

(supra), clearly authorizes recovery of attorney fees by a public officer, it being presumably recognized that such monies would be held in trust for and paid over to the government they represent.

Regarding Contention No. 3.

The discussion in the preceding paragraph would likewise apply herein. The fact that a public officer is salaried should not preclude the employing sovereign from recovering costs. The taxpayers of Alaska should be indemnified for the time these officials were required to devote towards this matter which could otherwise have been employed in more pressing office business.

Nor is there any validity in plaintiff's argument that to allow the Territory reimbursement or indemnity for the public expenses involved in effect is an "assessment of a penalty against the plaintiff taxpayer." The cost, solely attorney fees, being sought herein is not requested as a punishment but only as a recovery of a portion of the over-all expenses incurred by the Territory in this action.

The Territorial Treasurer, et al., as "nominal party defendants".

It is inconceivable how the plaintiff could maintain an action against only "nominal party defendants" when he specifically sought to enjoin their actions insofar as they attempt to perpetuate the provisions of Chapter 39 of the Session Laws of Alaska, 1955. Paragraph 10 of his Complaint reads as follows:

> "10. Said intention and acts of defendants to enforce and implement said legislation by paying

out public money for the transportation of pupils to sectarian and denominational schools will injure and take from plaintiff and the other taxpayers of said territory their said property and property rights, and will cause him and them material and irreparable loss."

CONCLUSION.

For the reasons above stated the Court is respectfully requested to affirm the lower Court's decision that appellant has no capacity to sue and the Territory is entitled to attorney fees.

Dated, Juneau, Alaska,
October 5, 1956.

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EDWARD A. MERDES,
Assistant Attorney General,
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(Appendices "A", "B", "C" and "D" Follow.)

Appendices.

Appendix "A"

CHAPTER 39, SESSION LAWS OF ALASKA, 1955.

AN ACT

To promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.

(H. B. 40)

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1. The Legislature recognizes these facts:

(a) Attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.

Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools, transportation shall likewise be provided for children who, in com-

pliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature.

Appendix "B"

CHAPTER 6, EXTRAORDINARY SESSION LAWS OF ALASKA, 1955.

"TRANSPORTATION TO SCHOOLS .....
.....TOTAL $1,250,000.00"
(commingled funds for public and private schools)

Appendix "C"

48 U.S.C.A. §77.

"* * * nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; * * *."

Appendix "D"

Rule 25(a) (1) of the New Uniform Rules of the District Court for the District of Alaska reads in part as follows:

"Rule 25. Attorney's Fees.

(a) Allowance to Prevailing Party as Costs: (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the prevailing party as a part of the costs of action allowed by law: * * *."

No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on behalf of himself and all other taxpayers similarly situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN MCKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

APPELLANT'S REPLY BRIEF.

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No. 15,135

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Appellees.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

It is a universal rule in both state and federal Courts that a *city or county taxpayer* sustains a *direct* and *special injury* entitling him to sue where he shows that city or county officials are about to make an illegal expenditure of tax-derived public funds. In

Massachusetts v. Mellon, 262 U. S. 447, the United States Supreme Court points out:

> "The interest of a taxpayer of a municipality in the application of its moneys is *direct and immediate,* and the remedy by injunction to prevent their misuse is not inappropriate."

See also *Crampton v. Zabriskie,* 101 U. S. 601; *Doremus v. Board of Education,* 342 U. S. 429, 433-434; *Everson v. Board of Education,* 330 U. S. 1; *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924); and 18 *McQuillin, Municipal Corporations* (3rd Ed.) §52.04.

It is also a well-nigh universal rule that *state taxpayers* sustain a *direct and immediate* injury entitling them to seek an injunction when they show that an unlawful expenditure of tax-derived state funds is threatened. Thus in *Herr v. Rudolph,* 75 N. D. 91, 25 N. W. 2d 916, the Court relied upon the county taxpayer cases to uphold a suit by a state taxpayer, saying:

> "It is true that these [city and county taxpayer] cases do not involve the expenditure of state funds but we can see no reason why the fact that the instant case does should render the rule there applied inapplicable here."

In our opening brief we cited illustrative cases from thirty state jurisdictions which uphold suits by state taxpayers. Appellees' counsel purport to have found five states not in accord. But the Louisiana case they cite was long ago overruled. See *Graham v. Jones,* 198 La. 507, 3 So. 2d 761. The Oregon case has been distinguished and is not followed in cases like

ours. See *State v. Metschan,* 32 Ore. 372, 46 Pac. 791, and *Evanhoff v. State Industrial Acc. Com.,* 78 Ore. 503, 154 Pac. 106. And serious doubt has been cast on the Washington authorities in cases such as ours where the Attorney General elects to defend the state officials. See *Reiter v. Wallgren,* 28 Wash. 2d 872, 184 Pac. 2d 571. We therefore justifiably assert that state taxpayer suits are today almost universally allowed.

Moreover, this almost universal rule allowing city, county, and state taxpayer suits has been applied again and again to allow suits by *territorial taxpayers* seeking, in cases like ours, to restrain the unlawful diversion of tax-derived territorial funds. The Supreme Court of Hawaii and the Court of Appeals for the First Circuit have both pointed to the *direct* and *special* interest of taxpayers of the Territories of Hawaii and Puerto Rico in preventing an unlawful expenditure of tax-derived territorial funds. For example, in *Castle v. Secretary of Hawaii,* 16 Hawaii 769, 776, the Court said:

> "While equity has not jurisdiction to determine political rights but is confined to questions affecting rights of property, it appears to us that the case presented by the plaintiff *in his capacity as a taxpayer* comes within equitable jurisdiction for *protection of property rights* against acts of executive officers under unconstitutional statutes." (Emphasis ours.)

See also *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir., 1944), Cer. Den. 323 U. S. 793; *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii

80; and *Castle v. Kapena,* 5 Hawaii 27; *cf. Bradfield v. Roberts,* 175 U.S. 291.

We come, then, to the conditions of the only real exception to the rule allowing taxpayers to object to the unlawful *diversion of tax-derived public funds.* This exception arises only when:

(1) *Taxpayers of the United States* sue;

(2) To prevent an unlawful diversion of funds from the *United States Treasury.*

In this area only have taxpayer suits generally been disallowed. There are at least four reasons for insistence upon these conditions for this exception.

First, a suit by a *United States Taxpayer* to challenge the validity of a *Congressional appropriation* necessarily involves a review by one branch of the Federal Government (the Judiciary) of the acts of another (the Legislative or Executive). Hence, a conflict with the Separation of Powers Doctrine of the Federal Constitution exists where no justiciable controversy is presented. Secondly, the mass of United taxpayers today numbers in the tens of millions; and to allow taxpayer suits on the *national* level would necessarily open the doors of the Federal Courts to literally tens of millions of taxpayer suits every time a single Congressional appropriation is made. Third, since United States District Courts (as distinguished from territorial District Courts) are traditionally and constitutionally Courts of very limited jurisdiction, the whole process of handling hordes of suits by United States Taxpayers would pose countless new legal and

administrative problems. Finally, while equitable taxpayer suits on the city, county, territorial, and state levels involve a substantial and measurable loss on the part of taxpayers, most United States Taxpayer suits would involve only an infinitesimal, immeasurable, and thus "de minimis" loss, justifying the conclusion that no real "case" or "controversy" would be presented within the meaning of Article III, Section 2 of the Federal Constitution.

In short, policy reasons of a unique and important nature distinguish suits by United States Taxpayers from those by local, territorial, or state taxpayers. As the Court of Appeals for the First Circuit explained so well in the *Buscaglia* case, 145 F. 2d 284:

> "In *Commonwealth of Massachusetts v. Mellon,* the Supreme Court decided as a question of first impression that a *federal taxpayer's* interest in monies in the *United States Treasury* is shared with so many others, *is so comparatively minute* and indeterminable, 'and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.' [262 U.S. 447, 43 S. Ct. 601, 67 L. Ed. 1078]. Then *on grounds of public policy* it reinforced its conclusion that a federal taxpayer, unlike a municipal one with respect to municipal funds, has no standing to seek an injunction against an alleged illegal expenditure of federal funds, and then said that when no justiciable controversy was before it, the doctrine of separation of powers prevented it from interfering with the action of executive officials on the

ground that the statutes under which they were acting were unconstitutional. It said: 'We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.' The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an *individual taxpayer to the Federal Government.* The interest of such an individual, as affected by an alleged illegal expenditure of *federal funds,* was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED;" (Emphasis ours.)

Respondents have supplied no valid answer to these compelling points. Instead, they misstate the facts in *Sheldon v. Griffin,* 174 F. 2d 382 (9th Cir., 1949). They ignore the express declaration of the Court in that case at 174 F. 2d 383, that "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA." They fallaciously argue that the exceptional rule disallowing suits by United States Taxpayers with respect to Congressional appropriations has applicability to *any* type of taxpayer suit, including those by territorial taxpayers. And they crown their efforts with the patently erroneous proposition that taxpayers as a class suffer no injury different from that of

the general public when tax-derived public funds are illegally diverted.

We shall take up these contentions in the following order.

ARGUMENT.

I. THE CONTENTION OF APPELLEES AND THE CONCURRENCE OF THE DISTRICT COURT THAT TAXPAYERS AS A CLASS SUFFER NO INJURY DIFFERENT FROM THAT OF THE GENERAL PUBLIC WHEN TAX-DERIVED PUBLIC FUNDS ARE ILLEGALLY SPENT IS PATENTLY ERRONEOUS. IT IS PRECISELY BECAUSE TAXPAYERS DO SUFFER DIRECT, SPECIAL, AND IMMEDIATE INJURY THAT THEY—AS DISTINGUISHED FROM MEMBERS OF THE GENERAL PUBLIC—ARE ALLOWED TO BRING CLASS SUITS TO CHALLENGE ILLEGAL EXPENDITURES.

In the Court below appellees moved to dismiss on the ground that the complaint did "not allege that the plaintiff will suffer any injury that will not be suffered in common by the *general public*". (Tr. 13.) The District Court erroneously agreed with this thesis, declaring (Tr. 23):

> "I am unable to find from the allegations of the complaint *that plaintiff has alleged any injury different from that of the general public.* In fact, the allegations of the complaint as noted above are quite to the contrary. *Nor can I agree that the term 'general public' is any different in the legal sense used than 'resident taxpayers,' which 'number many thousands.'* " (Emphasis ours.)

These contentions and conclusions are wrong. They ignore the fact that plaintiff pleaded, confirmed by

the District Court, that plaintiff is a citizen, resident, taxpayer; that all citizen, resident, taxpayers are in the same class as plaintiff and will suffer like injury; that the *funds appropriated are obtained from taxes paid by plaintiff and the taxpayers he represents;* that the funds so appropriated will be spent for illegal purposes and *will thereby be lost from the public funds of the Territory;* that such payment *"will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay;"* and that said action will therefore *"injure and take from plaintiff and the other taxpayers of said Territory their property and property rights, and will cause him and them irreparable loss"*. (Tr. 4-11.)

What clearer statement of a claim for direct, special and immediate injury could be made! Plaintiff *as a taxpayer* is injured. He sues for himself and the other *taxpayers of his class* who are also injured. He and they are injured because tax-derived funds will be spent for unconstitutional purposes. The injury is direct, immediate, and measurable in a Territory with less than 130,000 persons. The injury occurs because this statute appropriates Territorial money and thereby *adds to the burden of the taxpayers of Alaska. Cf. Sheldon v. Griffin,* 174 F. 2d 383 (There, *"the amendment under attack adds nothing to the burden of the taxpayers of Alaska"*).

Appellees' counsel apparently have realized the error of their argument that the injury here differs in no way from that of the general public. Recall,

both appellees and the trial Court claimed plaintiff's pleading showed no injury to plaintiff different from that of the "general public."

This is an ancient and often rejected argument. Appellees apparently have seen this from reading the cases we cited in our opening brief. For we now find appellees attempting to disavow their former contention by posing a new question. They *now* ask (R.R.B. 2):

> "Whether an Alaskan taxpayer as such, has standing to challenge the constitutionality of a Territorial statute authorizing the expenditure of Territorial funds when he failed to allege that as a result of the enforcement thereof he suffered a direct 'legal injury' different from that suffered by *the generality of taxpayers.*"

Note how appellees no longer talk of the "general public." They now refer to the *"generality of taxpayers."* But in this shift they concede their whole case. For appellees apparently recognize now that taxpayers *do* suffer injury different from that of the general public *when tax-derived public funds are illegally diverted.* So they now assert plaintiff has shown no injury different from that of the "generality of *taxpayers"* (not general public).

And even if so, appellant may sue!

Taxpayers as a class have been injured. And that is precisely why plaintiff has the standing to bring a *class suit.* He sues to prevent any further direct, immediate and special injury to himself *and the taxpayers he represents.*

A moment's glance at cases involving taxpayer suits make two points crystal clear: (1) Taxpayer suits *are* class actions, maintained by one or more of the group of taxpayers on behalf of the group as a whole. Obviously, therefore, plaintiff sustains the same injury as those in the injured class of taxpayers he represents. (2) Taxpayers individually and as a class sustain an injury different from that of the general public where an unlawful diversion of tax-derived funds is involved. The only exception to this latter rule is in the case of (1) taxpayers of the United States (2) to prevent an unlawful diversion of funds from the United States Treasury where the Supreme Court has held, *for special policy reasons,* that the difference between the injury to a United States Taxpayer and that to a member of the general public is so remote and immeasurable as to be "de minimis."

It, therefore, matters little to us whether appellees take their original position that territorial taxpayers sustain no injury different from that of the general public when tax-derived territorial funds are illegally expended; or whether appellees pursue their irrelevant argument that plaintiff's injury as a taxpayer is no different from that of other territorial taxpayers. Plaintiff said enough when he alleged that he and all taxpayers similarly situated will be injured by an illegal expenditure of tax-derived public funds which will add to their burden of taxes. It is because the taxes of plaintiff and those he represents will be illegally diverted to unconstitutional purposes that taxpayers as a class are injured and are entitled to sue.

And because taxpayers as a class are directly injured by reason of having their tax money spent for illegal purposes, their interest and injury are entirely different from the mere political interest of or injury to the general public.

A review of some of the important taxpayer cases will make obvious the fallacious reasoning of both the District Court and appellees.

A clear answer to appellees' arguments can be found in a very recent case challenging the constitutionality of appropriations of tax-derived public funds for parochial school bus transportation and other sectarian purposes. In *Berghorn v. Reorganized School Dist. No. 8,* 260 S.W. 2d 573, the Missouri Supreme Court said at pages 581-582:

> "It is admitted that plaintiffs and each of them are residents and taxpayers of the state of Missouri and of their respective school district. As such taxpayers, there can be no question as to their right and legal capacity to bring and maintain this action *for themselves and on behalf of all others similarly situated* to enjoin the unlawful expenditure of public funds. In such case *proof of illegal and unconstitutional expenditure of such public funds is sufficient to show private pecuniary injury,* because of the taxpayer's equitable ownership of such funds and his liability to replenish any deficiency resulting from the misappropriation. *Castilo v. State Highway Comm.,* 312 Mo. 244, 262, 279 S.W. 673; *Harris v. Langford,* 277 Mo. 527, 211 S.W. 19, 21; 52 *Am. Jur.* p. 3, *Taxpayers' Actions, Sec. 3. If funds* raised by taxation and expressly set apart by law for

> the establishment and maintenance of free public schools *are unlawfully expended* upon other and different schools, to-wit, parochial and sectarian schools, contrary to the constitutional mandate, as specifically pleaded by plaintiffs, *the necessary conclusion is that the burden of taxation on the resident tax-paying citizens will be increased.* The free public schools required by law to be established and maintained will have to be established and maintained out of additional funds raised to replace the funds unlawfully diverted. Further, it has been held that in such a case as this, 'where public interests are involved and public funds are about to be dissipated for an illegal purpose,' a taxpayer may maintain the action without being required to show at the trial the extent of the damage which he may sustain if the injunction be refused." [Emphasis ours]

Earlier, in *Castilo v. State Highway Commission,* 312 Mo. 244, 279 S.W. 673, the Missouri Supreme Court pointed up the distinction between taxpayers and the general public, stating at 279 S.W. 675:

> "The petition before us contains allegations of fact that defendant is about to cause to be constructed a road without authority of law and contrary to statute, and will unlawfully appropriate and expend thereon large sums of money, raised and to be raised by taxation, which have been provided, designated, and set apart for the one purpose of constructing other and different roads, to the irreparable injury of plaintiffs, and that they have no adequate remedy at law. Respondent says that the petition does not show that plaintiffs' taxes have or will be increased by the acts

of which they complain, or that they will suffer peculiar damage. The petition does not disclose the character or extent of plaintiffs' property, where situated or how specially affected by defendant's alleged unlawful acts, *unless it be through an increase in the burden of taxation.* The allegation that plaintiffs are resident taxpayers, suing for themselves and all other persons similarly situated, is, however, a precursor of other alleged facts evidently intended to show that they will suffer special injury in this way, and to support the general allegation of irreparable injury. The act of the General Assembly establishing certain highways and creating a State-wide connected system of hard-surfaced public roads extending into each county of the state, to be located, acquired, constructed, and improved, and ever after maintained as public roads by the state of Missouri, is pleaded. *If plaintiffs are resident taxpaying citizens, the cost of constructing highways authorized by law will be paid, not by the entire public, but by the taxpaying class of which plaintiffs are members, and which they here represent.* If funds raised by taxation, and expressly set apart by law for the construction of certain highways designated by statute, are expended upon other and different highways not authorized by law, as plaintiffs specifically plead, the necessary conclusion from the facts pleaded is that the *burden of taxation on resident taxpaying citizens will be increased.* The roads lawfully designated will have to be constructed and maintained out of additional funds raised to replace money unlawfully diverted. Failure to allege the ultimate fact that plaintiffs' taxes will

be increased when this conclusion necessarily arises from facts sufficiently pleaded is not material.

* * * * * * *

"It appears from the petition, therefore, that *plaintiffs have a special interest* in the subject-matter of this suit, *distinct from the general public, and have capacity to sue,* and we so hold." [Emphasis ours]

In *Gaston v. State Highway Dept.,* 134 S.C. 402, 132 S.E. 680, the petitioners, suing on behalf of themselves and other taxpayers, sought to restrain the state highway department from constructing a certain road in violation of law. A demurrer was interposed, challenging the petitioners' capacity to sue. The Supreme Court of South Carolina rejected the challenge, stating at 132 S.E. 682:

"The defendant, relying on the doctrine of public nuisances and wrongs, contends that in order to maintain their action the petitioners must show that they will suffer, through the actions complained of, special or peculiar injury differing in kind, as well as in degree, from that which the public generally will sustain. This doctrine, however, has no proper application to this case, and the authorities cited are therefore not controlling."

Another case pointing out the special and direct injury to a taxpayer, entitling him to sue, is *Terrell v. Middleton,* 187 S.W. 367 (Tex. Civ. App.) where the Court upheld a suit against state officials by a state taxpayer. The Court states at 187 S.W. 369:

"The first assignment of error assails the action of the trial judge in overruling an exception questioning the authority of a taxpaying citizen to institute and maintain a suit to restrain the comptroller from issuing warrants; the reasoning being that the plaintiff has no interest in the subject-matter of this suit, and that the 'pleadings affirmatively show that he has no interest in the suit other than as a citizen and as a taxpayer in general with other citizens and other taxpayers.' The allegations affirmatively showed that appellee as a citizen of Texas and a taxpayer had the right, power, and authority to institute and maintain a suit to restrain state officers from performing illegal, unauthorized, and unconstitutional acts.

* * * * * * *

"Appellee was seeking to prevent the diversion of taxes collected by the state, a portion, no matter how small, of which had been paid by appellee. Citizens are allowed to prevent, by injunction, the collection of illegal taxes, and the reasons for allowing them this power are no stronger than to allow restraint of an officer who seeks to expend the taxes when collected for an illegal or unconstitutional purpose. The diversion of the taxes after collection from legal purposes would be *equally as injurious to the taxpayer* as the collection of illegal taxes. *In either event, the burdens of the taxpayer are increased.*" [Emphasis ours]

In *Democrat Printing Co. v. Zimmercan,* 245 Wis. 406, 14 N.W. 2d 428, a taxpayer sued to enjoin the Secretary of State from approving vouchers for an alleged illegal expenditure. Overruling the contention

that the taxpayer had no standing to sue because he had not shown a substantial injury to himself, the Court said at 14 N.W. 2d 429:

> "The defendants also claim that a taxpayer's action does not lie unless the individual taxpayer plaintiff sustains substantial as distinguished from trivial loss if the expenditures involved be not enjoined. This is not tenable. It is injury to *taxpayers as a class* that is involved in the action and that loss in the instant case is substantial if the expenditures are illegal. The expenditures if they are illegal are continuing and in time would necessarily be of substantial amount." [Emphasis ours]

In *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359, the plaintiff sued as a state taxpayer to restrain the State Highway and Public Works Commission from illegally diverting public funds. Upholding the right of the taxpayer to maintain the suit, the Court said at 59 S.E. 2d 362:

> "While the activities of governmental agencies engaged in public service imposed by law *ought not to be stayed or hindered merely at the suit of an individual who does not agree with the policy* or discretion of those charged with responsibility, *the right of a citizen and taxpayer* to maintain an action in the courts to restrain the unlawful use of public funds to his injury *cannot be denied."* [Emphasis ours]

Finally, in the case of *Funk v. Mullan Contracting Co.,* 78 A. 2d 632 Md. Ct. of Appeals) the Court upheld a pleading in a class action by a state taxpayer suing state officials in a case similar to ours. Pointing

out that it is the allegation that illegal expenditures will materially increase taxes that shows the taxpayer's special injury, the Court of Appeals of Maryland said at 78 A. 2d 635:

> "The bill of complaint sets out that the effect of the Act in establishing schedules of wages will materially increase the cost of construction work of the State of Maryland, *and thereby place an additional burden upon the taxpayers of the State.* A taxpayer is entitled to invoke the aid of a court of equity to restrain the action of an administrative agency of the State, when such action is illegal and may injuriously affect the taxpayer's rights or his property, *Masson v. Reindollar,* Md., 69 A. 2d 482, and his right to make such a claim does not depend upon the result; that is, he may be wrong in his contention, but nevertheless he has the right to invoke the aid of the courts to make it. In this case, there is a contention that the Act creating the Commission is void, and that the effect of acting under it will be to increase the cost to the State, and therefore to the taxpayers, of all of its construction work. We think the appellees, as taxpayers, were entitled to bring this suit. The case presented here here is materially different from that in *Phillips v. Ober,* Md., 78 A. 2d 630. *In that case, it was not alleged that the taxpayers would be pecuniarily affected. In the case before us, it is so alleged.*" [Emphasis ours]

And so it is in our case. We show that the burden of taxpayers will be increased by illegal expenditures from the tax-derived General Fund of the Territory of Alaska!

II. APPELLEES MISTAKENLY RELY ON THE MANY FEDERAL CASES HOLDING THAT SUITS BY UNITED STATES TAXPAYERS PRESENT ONLY A "DE MINIMIS" CONTROVERSY. SUCH CASES HAVE NOTHING TO DO WITH SUITS BY CITY, COUNTY, TERRITORIAL, OR STATE TAXPAYERS WHERE A DIRECT, SPECIAL, AND MEASURABLE INJURY IN THE FORM OF AN ADDED TAX BURDEN WILL RESULT FROM AN ILLEGAL EXPENDITURE OF TAX-DERIVED PUBLIC FUNDS. IN FACT, TERRITORIAL TAXPAYER SUITS ARE CLOSELY ANALOGOUS TO COUNTY TAXPAYER SUITS WHICH ARE UNIVERSALLY ALLOWED.

We already have shown that city, county, territorial, and state taxpayer suits are almost universally allowed where an illegal expenditure of the tax-dederived public funds is involved. In fact, appellees expressly concede this point (Brief For Appellees, pages 16-17).

And, as we also have pointed out, these city, county, territorial, and state taxpayer cases have involved injury *to taxpayers* as a class—injury different from that of the general public—an injury direct, immediate and measurable because it is an added tax burden.

Appellees appear to concede this point too, since they rely almost exclusively on the *United States* Taxpayer cases such as *Massachusetts v. Mellon* where there was no *measurable* injury due to the vast sums of money in the U. S. Treasury and the vast number of taxpayers interested therein.

Let us examine the cases appellees cite at pages 7 to 16 of their brief.

Massachusetts v. Mellon involved a suit by *United States* Taxpayer seeking to challenge the validity of a Congressional appropriation from the *United States*

Treasury. Alabama Power Co. v. Ickes, 302 U. S. 464, rejected a suit by a *United States* Taxpayer complaining of allegedly illegal grants and loans from the *United States Treasury. Florida v. Mellon,* 273 U. S. 12, rejected a suit by a *state* which challenged a *United States* Inheritance Tax. *Williams v. Riley,* 280 U. S. 78, rejected a suit by a state taxpayer asserting that *United States Treasury* grants for highways were being improperly applied by a state which was supposed to grant *free* use of the highways, but actually imposed a 3 cents gasoline tax on state users. *Fairchild v. Hughes,* 258 U. S. 126, rejected a suit by *United States* Taxpayers seeking to enjoin the U. S. Secretary of State from issuing a proclamation concerning the suffrage amendment.

Most of these cases hold that a *United States* Taxpayer cannot complain about expenditures *from the United States Treasury* because he sustains only a "de minimis" loss from any given expenditure. The remainder of the cases did not involve *any* loss of tax-derived public funds.

The same thing is true of the Court of Appeals decisions appellees cite. *Elliott v. White,* 23 F. 2d 997, rejected a *United States* Taxpayer suit against the *United States Treasurer. Duke Power Co. v. Greenwood County,* 91 F. 2d 665, rejected a *United States* Taxpayer complaint against *United States Treasury* loans and grants to cities. *Wheless v. Mellon,* 10 F. 2d 893, rejected a suit by a *United States* Taxpayer against the *United States Treasurer. Railway Express, Inc. v. Kennedy,* 189 F. 2d 801, rejected a com-

plaint by a *United States* Taxpayer about the payment of *United States Treasury* funds. *Arkansas-Missouri Power Co. v. City of Kennett,* 78 F. 2d 911, held a *United States* Taxpayer could not question the right of the *United States* to make a loan. *Fallbrook Public Utility District v. U. S. Dist. Court,* 202 F. 2d 942, rejected a *United States* Taxpayer's challenge of an expenditure from the *United States Treasury* for certain federal attorneys.

These cases have nothing to do with our problem. They re-affirm the rule in *Massachusetts v. Mellon* that a taxpayer of the United States has too remote an interest in the funds of the United States Treasury to bring him within the "case or controversy" requirement of the Federal constitutional Courts. The cases have nothing to do with suits by city, county, territorial, and state taxpayers seeking to prevent an added tax burden by reason of a threatened unlawful expenditure of tax-derived city, county, territorial, or state funds.

In fact, how can respondents deny the repeated rulings of Federal Courts that *Federal Courts* can and will entertain *taxpayer suits* whenever the unique "deminimis" problem of *United States* Taxpayers is not present. See *Doremus v. Board of Education,* 342 U. S. 429, 433; *Everson v. Board of Education,* 330 U. S. 1; *Crampton v. Zabriskie,* 101 U. S. 601; *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir.); *Valentine v. Robertson,* 300 Fed. 521 (9th Cir.).

And what of the observation of Judge Reed in *Wickersham v. Smith,* 7 Alaska 522, 535-536, that a

territory is not like a state—*that it is like a county* in that its revenues, property, and very existence depend upon the will of Congress? This distinction was noted by the United States Supreme Court in *First National Bank of Brunswick v. Yankton,* 101 U. S. 129, 25 L. Ed. 1046, 1047:

> "The territories are but political subdivisions of the outlying dominion of the United States. THEY BEAR MUCH THE SAME RELATION TO THE GENERAL GOVERNMENT THAT COUNTIES DO TO THE STATES, and Congress may legislate for them as states do for their respective municipal organizations."

The similarity between territories and counties in the matter of achieving protection for taxpayers is striking. Territorial taxpayers, like county taxpayers, are subject to the whims of political subdivisions when it comes to possible illegal diversions of tax-derived public funds. Territorial taxpayers, like county taxpayers, are protected against these whims by the organic law or constitution enacted by the sovereign entity—the Congress on the one hand and the state on the other. Territorial taxpayers, like county taxpayers, may obtain redress against violations of the organic law in judicial tribunals established by the sovereign power and free from control of the political subdivision. Thus territorial District Courts are federally established and are courts of general jurisdiction with full equity powers, just as county courts are state established and are courts of general equity jurisdiction.

Appellees concede that the jurisdiction of the District Court in this case rested upon the general equity jurisdiction granted by 48 U. S. C. Section 101 (Brief For Appellees, page 2). The judicial clause of the Federal Constitution has no application to Courts created in the territories; and with respect to them, Congress has a power wholly unrestricted by it. *Downes v. Bidwell,* 182 U. S. 244.

The territory of Alaska has a population much smaller than those of a vast number of counties in the United States. Moreover, as the United States Supreme Court observed in *First National Bank of Brunswick v. Yankton,* 101 U. S. 129, the territories bear much the same relation to the Federal government as counties do to the state. In addition, the District Court of Alaska exercises the same general equity jurisdiction that our county trial courts do and thus should afford the same remedy to Alaskan taxpayers as is universally afforded county taxpayers in county trial courts. See *Valentine v. Robertson,* 300 Fed. 521.

But whether appellant's standing to sue be upheld on analogy to county taxpayer suits, or by treating the territory as a state, the authorities are overwhelming in favor of allowing *both* county and state taxpayer suits. Appellees' cases dealing with United States Taxpayers and their remote, infinitesimal interest in the United States Treasury are therefore completely irrelevant.

The cases have so held in respect of Hawaiian and Puerto Rican taxpayer suits! See pages 17 to 26 of our opening brief.

III. APPELLEES ASK THIS COURT TO REPUDIATE THE FIRST CIRCUIT AND HAWAIIAN CASES BY CLAIMING THE NINTH CIRCUIT HAS ALREADY REJECTED TERRITORIAL TAXPAYER SUITS. APPELLEES WRONGLY IGNORE THE PLAIN LANGUAGE OF THIS COURT THAT THE CASE OF SHELDON v. GRIFFIN DID NOT INVOLVE AN EXPENDITURE OF TAX-DERIVED PUBLIC FUNDS AND INVOLVED NO ADDED BURDEN ON TAXPAYERS. THE SHELDON CASE IS LIKE THE RECENT DOREMUS CASE AND INVOLVED NO INJURY TO TAXPAYERS AS SUCH.

Appellees present an absurd spectacle in trying to impeach the statement of facts and plain language of this Court in *Sheldon v. Griffin,* 174 F. 2d 382.

The *Sheldon* decision states clearly and succinctly that the taxpayer in that case was seeking to enjoin the Alaska Unemployment Compensation Commission from granting credits to certain employers and from reducing the waiting period before paying benefits to an unemployed person. The constitutionality of the enabling amendment was challenged. But the Court said there was no justiciable controversy. Its language—plain and clear—is as follows:

> "In his complaint the plaintiff alleged merely that he is a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. The AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA. THE UNEMPLOYMENT COMPENSATION FUND administered by the Commission IS MADE UP OF CONTRIBUTIONS EXACTED FROM EMPLOYERS in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. Alaska Compiled Laws

> 1949, §51-5-5. There is nothing in the pleading or proof to indicate that the plaintiff has a particular right OF HIS OWN to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law." (Emphasis ours.)

There is no mystery in this language. The Court says a taxpayer cannot sue if taxpayers as such are not injured. It says that the threatened expenditures would not be made from tax-derived public funds. The threatened expenditures were to be made from a fund composed primarily of *employer* contributions. The employer-contribution fund was not derived from the taxpaying class that plaintiff sought to represent. If the threatened expenditures had been made, not a penny of tax-derived public funds would be spent, only funds contributed by employers. In consequence "The amendment under attack adds nothing to the burden of the taxpayers of Alaska."

We repeat the language of the Court at 174 F. 2d 383:

> "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA."

Why? Because no funds collected from those taxpayers were to be spent pursuant to the amendment.

It is therefore apparent why taxpayers could not challenge the amendment. They suffered no special injury. They suffered no injury different from that of the general public. Taxpayers as such had no more

interest than anyone else in the expenditure of funds *collected from employers.*

Appellees seek to confuse the issue by digging up the pleadings in the record of the *Sheldon* case, but appellees cannot alter the *facts* any more than the plaintiff in that case could create a justiciable controversy. No burden was added upon Alaskan taxpayers by the state action there challenged.

Similarly in *Doremus v. Board of Education,* 342 U.S. 429, a taxpayer sued to prevent the reading of the bible in the public schools. The U. S. Supreme Court held the taxpayers had no standing to sue because there was no injury to taxpayers as such. The reading of the bible added nothing to the tax burden. And the court relied on *Massachusetts v. Mellon* rule that there can be no justiciable controversy where taxpayers as such do not sustain an immediate measurable injury.

But note. The U. S. Supreme Court expressly pointed out in the *Doremus* case that taxpayer suits are proper where there is an unlawful diversion of tax-derived public funds. The court said at 342 U. S. 429, 433, 434:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. Alabama Power Co. v. Ickes, 302 U.S. 464, 478, 479, 88 L. Ed. 374, 377, 378, 58 S. Ct. 300; *Massachusetts v. Mellon,* 262 U.S. 447, 486, et seq., 67 L. Ed. 1078, 1084, 43 S. Ct 597.

The latter case recognized, however, that 'The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.' 262 U.S. at 486. *Indeed, a number of states provide for it by statute or decisional law and such causes have been entertained in federal courts.* Crampton v. Zabriskie, 101 U.S. 601, 609, 25 L. Ed. 1070, 1071. See Massachusetts v. Mellon, supra (262 U.S. at 486, 67 L. Ed. 1084, 43 S. Ct. 597). *Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury,* we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' Massachusetts v. Mellon, supra, (262 U.S. at 488, 67 L. Ed. 1085, 43 S. Ct. 597).

"*It is true that this Court found a justiciable controversy in Everson v. Board of Education,* 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392. *But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of.* This complaint does not."

* * * * * * *

"*The taxpayer's action can meet this test,* but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought

to litigate here is not a direct dollars-and-cents injury but is a religious difference. *If appellants established the requisite special injury necessary to a taxpayer's case or controversy,* it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation." [Emphasis ours.]

The basic error of appellees' position is demonstrated by the foregoing language in the *Doremus* case and by the holding of the United States Supreme Court in *Everson v. Board of Education,* 330 U.S. 1.

In the *Everson* case, a suit by a taxpayer to prevent the disbursement of school-district funds for parochial school bus transportation was held to present a justiciable controversy.

The Territory of Alaska constitutes a political subdivision no larger in population than the kind of subdivision involved in the *Everson* case. Our case involves a measurable appropriation of tax-derived funds for parochial school bus transportation, and there is obviously an added burden to the taxpayers of Alaska. Such taxpayers should therefore be allowed to sue just as they were in the Hawaiian and Puerto Rican cases and in the *Everson* case.

The case of *Sheldon v. Griffin* bears no resemblance to ours. It was correctly decided and is inapplicable. Appellees say they have found no case where a distinction has been drawn between those taxpayer suits which involve an added tax burden and those which do not (Brief for Appellees 21). They apparently have chosen to ignore *Everson v. Board of Education,* 330 U.S. 1 and *Doremus v. Board of Education,* 342 U.S. 429.

IV. APPELLEES HAVE FAILED UTTERLY TO ANSWER OUR POINT THAT THE TERRITORY OF ALASKA IS NOT A PARTY TO THIS ACTION AND THEREFORE CANNOT RECOVER ATTORNEYS' FEES AS THE "PREVAILING PARTY".

Appellees have conceded our point by the very statute and rules they cite.

Appellees cite Section 55-11-51 A.C.L.A. 1949. But this section allows attorney's fees only "TO THE PREVAILING *PARTY* . . . BY WAY OF INDEMNITY." We repeat. Only the prevailing *party* may recover attorney's fees. And such fees may be recovered only *by way of indemnity.*

Appellees cite Rule 54(d), Federal Rules of Civil Procedure. Rule 54(d) allows costs only to the prevailing *party.* The Territory of Alaska was not and could not be a party to this suit.

Appellees cite Local Rule 25 for the District Court of Alaska. Rule 25 talks only of attorney's fees "for the prevailing *party.*" The Territory of Alaska was not and could not be a party to this suit.

In countless taxpayer suits, the courts have pointed out that the sovereign was not and could not be a party to the action. The very reason why the action is allowable is because it is not against the sovereign, but rather against officers of the sovereign and which officers are defaulting in their public duties. We therefore say again, the Territory of Alaska is neither the nominal nor the real party in this action. The action was brought against officials of the Territory of Alaska who were about to violate their duty to obey the Organic Law and the Constitution of the United States.

Appellees wrongly state that we claim the territorial officials were "nominal" parties. We made no such statement, nor do we make it now. The territorial officials are the actual parties, the real parties, and the only parties to this suit. Certainly these parties cannot collect attorney's fees *by way of indemnity*. Moreover, they have paid no money whatsoever for the services of an attorney.

Appelees therefore have failed utterly to establish either that the Territory of Alaska is a party to this action or that the prevailing parties in this case suffered a loss for which they may be indemnified. Hence, there can be no recovery of attorney's fees.

CONCLUSION.

For the reasons stated, it is therefore respectfully submitted that the judgment of the District Court, dismissing plaintiff's complaint and ordering that defendant (sic) recover attorney's fees in the amount of $250.00, should be reversed with instructions to deny defendants' motion to dismiss, and with costs to plaintiff.

Dated, November 23, 1956.

Respectfully submitted,

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